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DECEMBER, 1914—MAY, 1915.

EDITOR:
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VOLUME XXX.

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Western Law Reporter

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MANITOBA.

NOVEMBER 24TH, 1914.

COURT OF APPEAL.

REX v. PRICE AND BURNETT.

Criminal Law—Speedy Trial of Indictable Offences—Election as to Mode of Trial—Sec. 778 of Code as Amended by 8 & 9 Edw. VII. ch. 9—Election Under said Section Governed by sec. 825.

Held, that, under sec. 778 of the Criminal Code, as amended by 8 & 9 Edw. VII. ch. 9, a magistrate has not the power which he had, under sec. 785, prior to the said amendment, to set up in a warrant of commitment that an accused person elected before him to be tried by a jury; that, by virtue of the said amendment, sec. 830 had no application to an election made before a magistrate under part XVI. of the Code, an election so made being governed by sec. 825 without regard to sec. 830.

Held, that a prisoner had a right to elect under sec. 825 after the Grand Jury had found a true bill.

Rex v. *Thompson*, 17 M. R. 608; *Rex* v. *County Judge's Criminal Court*, 16 D. L. R. 500, followed.

On the 6th day of November, 1914, the prisoners were charged at the Winnipeg Police Court before the police magistrate of the said city (Winnipeg being a city having a population of over 2,500 according to the last decennial census taken under the authority of an Act of the Parliament of Canada) with having obtained $35 by false pretences with intent to defraud. The said police magistrate thereupon made to the prisoners the statements required by sub-sec. 2 of sec. 778 of the Criminal Code. The prisoners after such statements were made to them elected for trial before a jury. The said police magistrate then proceeded as directed by sec. 785 of the Code and the prisoners were com-

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INDEX-DIGEST

DECEMBER, 1914—MAY, 1915.

EDITOR:
L. S. LEVERNOIS
Barrister-at-Law.

VOLUME XXX.

TORONTO:
THE CARSWELL COMPANY, LIMITED
1915

magistrate or "to be tried in the ordinary way by the Court having criminal jurisdiction."

A choice of the latter alternative does not imply an election to be tried by a jury. It only means that the accused refuses to be tried by the magistrate and reserves to himself all rights he has as to his manner of trial if committed for trial. Those rights include the right to elect to be tried at the County Court Judge's Criminal Court.

Therefore it seems to me that the first of the conditions precedent to sec. 830 applying has never arisen.

I also doubt if the second condition has arisen, though that need not be decided.

If I am right in the above, sec. 830 has probably become inoperative as to part XVI. of the Code. The argument that if that had been the intention of Parliament it would have been repealed when the Act of 1909 was passed, is met by the fact that sec. 830 applies to part XVII. as well, and the election before the magistrates in the latter part (by sec. 807) has not been changed. So that there is, because of part XVII, still a reason for the existence of 830.

Before the true bill was found the accused, by their counsel, notified the Sheriff that they elected to be tried by the County Court Judge's Criminal Court. Later, on the same day, a true bill was found by the grand jury.

Assuming, however, that the bill was so found before the accused did elect, I think the case of The King v. Thompson, 17 M. R. 608, applies, and that the accused still has the right of election.

With deference I would answer in the negative the question asked by the stated case.

HAGGART, J.A.:—Section 778 of the Criminal Code ch. 146, R. S. C. as amended by ch. 9, 8 & 9 Edw. VII. provides that "(2) if the charge is not one that can be tried summarily without the consent of the accused the magistrate shall state to the accused (a) that he is charged with the offence, describing it, (b) that he has the option to be forthwith tried by the magistrate without the intervention of a jury or to remain in custody or under bail as the Court decides to be tried in the ordinary way by the Court having criminal jurisdiction."

There was open to the prisoners the two alternatives. The prisoners exercised their option and chose the latter

namely, "to be tried in the ordinary way by the Court having criminal jurisdiction." That does not mean that the prisoners elected to be tried by a jury. It is true that the assizes is a "Court having criminal jurisdiction." The County Court Judge is also a "Court having criminal jurisdiction." Section 824 of the Code enacts that, "The Judge sitting on any trial under this part for all the purposes thereof and proceedings connected therewith or relating thereto shall be a Court of record," &c. There was clearly no election here and could be no election as between a jury and a County Court Judge.

Under these circumstances the prisoners were after the commitment entitled to the benefit of sec. 826 and following sections relating to procedure, and to be brought before the Judge and pursuant to sec. 827 to be told by the Judge that they had "the option to be tried forthwith before a Judge without the intervention of a jury or to remain in custody or under bail as the Court decides to be tried in the ordinary way by the Court having criminal jurisdiction."

With all due respect to the Chief Justice of the King's Bench, I would answer in the negative the question reserved for the opinion of this Court, and would direct that the prisoners be at liberty to withdraw their plea and elect to take a speedy trial under the appropriate sections of part XVIII. of the Criminal Code.

I do not think under the circumstances that this case is a re-election as is contemplated by sec. 830—which the Chief Justice considered to be decisive of the question before the Court. A careful reading of this section shews that it applies to a "person after his election to be tried by a jury." Here, strictly speaking, the prisoners have never elected to be tried by a jury. If there is any discrepancy or apparent contradiction between this section of the Code and the former sections referred to as amended in 1909, then the former, being the later enactments, would govern.

The Crown simply wants a judicial interpretation of the Statute and the foregoing is my reading of it.

PERDUE and CAMERON, JJ.A., concurred with HOWELL, C.J.M.

MANITOBA.

NOVEMBER 30TH, 1914.

COURT OF APPEAL.

NORTHERN TRUST CO. v. COLDWELL.

Gift — Life Insurance Policy — Debt of Donor to Donee Existing at Date of Gift—Obligation not Maturing until Death of Donee—Conditions of Policy—Intention—Presumption of Gift—Performance—Satisfaction.

A son insured his life for $2,000, payable to his mother. At the date of the policy, and for about 2 years prior thereto, there existed an indebtedness of $4,000 from the son to the mother. After the son's death, the mother received the $2,000 insurance money. By his will the son directed that out of the income from his estate his executors should pay to his mother annually, during her life, $280, being interest at 7 per cent. on $4,000, and the $280 was paid annually, until the mother's death. After her death the son's executors paid to her executors $2,000 as part of the $4,000 indebtedness from the son to the mother. The son's executors claimed that the insurance money received by the mother should be charged against this debt. According to the conditions on which the policy was issued the son could not make a creditor or his personal representative the beneficiary.

Held (PERDUE, J.A., dissenting) that it was the intention of the son when he took the policy to *give* the money payable thereunder to his mother, he having no idea of violating the condition in the policy prohibiting a creditor from becoming beneficiary, the sole question being what he originally intended by the insurance, not his subsequent intentions to change the destination of the money, the change not having been completed.

Re Mills, 28 O. R. 563, referred to.

Judgment of MATHERS, C.J.K.B., 28 W. L. R. 625, affirmed.

Appeal from the judgment of MATHERS, C.J.K.B., 28 W. L. R. 625.

The appeal was heard by HOWELL, C.J.M., PERDUE, CAMERON, and HAGGART, JJ.A.

C. P. Wilson, K.C., and W. C. Hamilton, for defendants, appellants.

Sir James Aikins, K.C., and A. C. Ferguson, for plaintiffs, respondents.

HOWELL, C.J.M.:—By a "Certificate of Membership" in the Odd Fellows Relief Association, granted to Herbert Inman, a member thereof, dated 23rd June, 1898, it was provided that upon the death of the said Herbert Inman

there should be paid to his mother Mary A. Inman "or to such other person or persons as may hereafter be lawfully designated by the member or to the legal representatives of the above described member," the sum of $2,000. The certificate is issued subject to certain conditions, and amongst them is one as follows:—

"Each member shall designate the person or persons to whom the beneficiary fund due at his or her death shall be paid, who shall in every instance be one or more members of his or her family, or who shall be related to him or her by blood, or who shall be dependent upon him or her, but an unmarried member, (except he be a widower with children), may designate as his beneficiary his legal personal representative or representatives, and no member or applicant for membership shall be permitted to name any creditor as his or her beneficiary.

"A member in good standing may at any time, change his or her beneficiary or beneficiaries, subject to the conditions of the preceding section, and to the provisions of any law in force in Ontario with regard to securing to wives and children, or other relatives, the benefit of life insurance or otherwise.

"No certificate shall be assigned to others as collateral security for debt, nor shall the beneficiary or beneficiaries be changed, except in the manner provided for in this constitution."

There is another condition which allows the change of the beneficiary by the member even if the certificate is in the possession of the first named beneficiary.

About two years prior to the issue of this certificate Herbert Inman obtained from his mother the sum of $4,000, whether as a loan or as an advancement does not appear.

By his will, dated 1st September, 1904, Herbert Inman, amongst other dispositions of his estate, made a provision for his mother as follows:—

"I direct that out of the yearly income from my estate my executors shall pay to my mother, Mary Ann Inman, at her place of residence, the sum of $280 on the 1st day of November, in each and every year during her life, such payment being the interest upon $4,000, reckoned at 7 per cent. per annum."

It is apparent from the evidence and admissions that the mother knew nothing of the existence of this certificate or

policy until after the death of her son, which happened on the 17th of November, 1904, and it further appears that the certificate always remained in the possession of Herbert and was at his death found amongst his papers and was taken possession of by the executors of his estate.

Probate was shortly afterwards granted to his will and the insurance money, $2,000, was, on the 21st of February, 1905, paid by the benevolent society to Mrs. Inman, the beneficiary above referred to, the mother of the deceased.

Apparently, as I gather from the evidence of one of the executors, she first became aware of the existence of this insurance from him, and I infer from the evidence that he approved of her getting, and assisted her in getting this money.

Mrs. Mary A. Inman died on September 11th, 1908, and probate to her will was soon after granted to the plaintiffs in this action and the defendants are the executors of the late Herbert Inman.

During the whole of the lifetime of Mrs. Inman, the executors of her son's estate paid to her regularly the annuity of $280 above referred to.

On the 18th of March, 1909, the defendants paid to the plaintiffs the sum of $2,000 which they admit was part of a debt owed by the late Herbert Inman to his late mother, and they further admit that there was an original debt of $4,000, but claim that the insurance money received by the mother should be charged against this debt, and this is the whole controversy.

A memorandum in the handwriting of Herbert Inman was produced, but its date is not given. It must have been written after the insurance in question was procured. It is merely a statement to his mother that he intended to make a will in which after providing for his wife, he intended to leave the insurance in question, with other property valued at about $20,000 to his mother for life with remainder to his children, in this language:—

"I wish you to have the full benefit as long as you live, you to help the family as you see fit and as they might require it."

This memorandum comes from the possession of the plaintiffs. It was not signed and there is no evidence when it was written, and no will was produced or proved, made in any way in its terms.

It seems to me that the whole question is, did Herbert Inman, when he procured the certificate or policy, intend to give to his mother the money which would be payable at his death? If he intended subsequently that it should be applied on this alleged debt, then I cannot see why, when he made his will, he provided that an annuity of 7 per cent. on the whole debt should be paid to his mother as long as she lived. According to the conditions on which the policy was issued he could not make his executors the beneficiaries because he had both wife and children and he could not make a creditor his beneficiary. If his mother was made a beneficiary because she was a creditor, and there was a secret agreement that she should so apply the money, it would probably be a fraud on the society. I do not believe he had any such idea. If he subsequently changed his mind and wished it to go to his children he could have, under the rules of the society, changed the destination of the money, but he has not done so, and perhaps he contemplated doing this when he wrote the memorandum above referred to. However, the sole question is what he originally intended by the insurance, not his subsequent intentions to change the destination of the money, the change not having been completed. After the death of her son the mother took the insurance money and for 4 years received the annuity of 7 per cent. on $4,000 and made no claim for the principal.

The whole scheme of the insurance as between the society and Herbert Inman was a gift upon his death to some one related to him by "blood;" it must not be made to a creditor nor to his personal representatives. Pursuant to this arrangement the society, with the knowledge and consent of the executors, (they assisting by delivering up the policy) paid the money to the mother as beneficiary and not as a creditor. If she had not been a creditor it seems to me her right to hold this money would be unassailable. If he had given her the document (the policy) the executors could not have recovered it from her. Rummens v. Hare, 1 Ex. D. 169.

If her estate is liable for this $2,000, then the personal representatives of Herbert Inman get the money, a thing which he agreed with the society should not be. If she had applied the insurance money on the debt when she got it, she would have acted contrary to the agreement between the society and her son.

The beneficiary is not prevented from recovering because the party procuring the insurance pays the premiums and retains the policy in his own hands, indeed Mrs. Inman was the only person who could compel payment: Weston v. Richardson, 47 L. T. 514.

Where a policy of insurance was made payable to the father of the insured, who was not a creditor of his son, and died before the latter, and the insured had always paid the premium and had always kept possession of the policy, the full Court in Nova Scotia held that the father's estate was legally and beneficially entitled to the insurance money: Mumford v. Mumford, 19 N. S. 210.

The case of Re Scottish Equitable, [1901] 1 Ch. 282, was much relied upon by the defendants. In that case the sister of the wife of the assured was made the beneficiary and in the circumstances the Court treated the matter as one where there would be no presumption of a gift.

In this case I think Herbert Inman intended, when he took the policy, to give the money payable thereunder to his mother. I think he had no idea of breaking faith with the benevolent society, and he did not intend to thereby help pay his debts. This case is not unlike Re Mills, 28 O. R. 563.

This matter does not require a consideration of 14 Geo. III., ch. 48; North American Life v. Craigen, 13 S. C. R. 278.

The defendants have admitted that the estate represented by them is indebted to the plaintiffs for $2,000 and as I think they cannot get credit for the insurance money, that sum is still due.

The appeal must be dismissed with costs.

PERDUE, J.A. (dissenting):—The learned Chief Justice of the King's Bench has fully set out in his judgment the facts of this case, and I shall only briefly refer to them. The mother, Mary Ann Inman, had made an advance of $4,000 to her son Herbert Inman. There is nothing to shew when, if at all, this advance was to be repaid. The defendants, the executors of the son, admit, however, that at the time of his death he was indebted to his mother in the above amount. The question involved in this suit is simply one as to how the proceeds of an insurance policy for $2,000 on the life of Herbert Inman should be applied. This question, it appears to me, is really one of intention upon his part when he

took out the policy. This policy was dated 23rd June, 1898, was issued by the Odd Fellows Relief Association of Canada and was made payable to the mother of the insured. The indebtedness from the son to the mother in respect of the advance was existing at the time of the issue of the policy.

At the date of the policy the son had a wife and children.

Pursuant to the order for production the plaintiffs produced a memorandum in the handwriting of Herbert Inman which must have been in the hands of Mary A. Inman and have come to her executors amongst her other papers. This memorandum is undated and unsigned. Although not formally addressed to his mother it is intended for her and informs her as to his intentions regarding the disposition of his property by will. He says:—

"I am making a new will as follows: To Minnie (his wife) insurance $500 per year for 20 years, $2,000 in Workmen and my residence and contents. The balance I leave to you to be divided amongst the family at my death if you survive me. It consists of insurance in Odd Fellows $2,000, the Black property, the farm property, and other farms, about $20,000. I wish you to have the full benefit as long as you live, you to help the family as you see fit, and as they might require it."

Although the memorandum says in one place the balance of his property is to be divided amongst his family at his death and in another place that his mother is to have the full benefit of it as long as she lives, subject to helping the family, the intention of Herbert Inman at the time he wrote the memorandum clearly was that his mother should not in any event have more than the enjoyment of the property during her lifetime. I would draw the inference that he had the same intention when he made the policy payable to her. She seems to have been a person of some means and not to have been in need of a provision for her support. It is argued that, although he had a wife and children to maintain and provide for still his affection for his mother was so great that he made this policy payable to her and intended to donate it to her absolutely. I can scarcely credit that he, a man of moderate means, intended not only to repay his mother the money she had advanced, but also to make her a present of $2,000 of insurance money, thereby depriving his wife and children of that sum.

Inman apparently intended to make by will provision for his wife and to entrust his mother with the balance of his estate, whether to divide it amongst his family or to take the income of it as long as she lived and help them as she saw fit and as they required it. It is to be noted that he speaks of the policy as part of the balance of his estate and names it in the same rank as he does the rest of his property not left to his wife. He did not make this policy payable to his wife, having, it would seem, some other purpose in view. By the rules of the Odd Fellows' Relief Association it had to be made payable to a relative and he very possibly selected his mother as the person to receive the money, although not intending that she should take it absolutely.

Although the mother had in her hands the memorandum above referred to, the fact that the insurance policy was by its terms payable to her was never communicated to her during the son's lifetime. He retained the policy and paid the premiums. The policy was found amongst his other policies of insurance after his death and his mother was surprised when she learned that the proceeds were payable to her.

An ordinary gift of a chattel is not complete unless accompanied by delivery, or what is equivalent to delivery. There must be a giving and a taking. "The proposition before the Court on a question of gift or not is—that the one gave and the other accepted:" per Lord Esher, M.R., in Cochrane v. Moore, 25 Q. B. D. 57, 75. The same authority shews that the transaction of gift must be begun and completed at once. The present case is, however, more in the nature of a purchase made by a person in the name of another, but with his own money. In such a case if the party in whose name the purchase is made is neither the purchaser's child, adopted child, nor wife, there is prima facie no gift, but a resulting trust for the person paying the money: Dyer v Dyer, 2 Cox 92; Benbow v. Townsend, 1 My. & K. 506. The Venture (1908), p. 218; 15 Hals. 414. This presumption can be rebutted by sufficient evidence, but in the absence of such evidence there will be a resulting trust in favour of the purchaser or of his estate, even though the purchase is made by a child in favour of a parent. This principle applies not only to real estate but to personalty also. It applies to a purchase of a bond, or annuity, or stock, or to a policy of life

insurance taken in favour of another person: Lewin on Trusts, 12th ed., p. 184.

In Pfleger v. Browne, 28 Beav. 391, a debtor took out a policy of insurance on his life in favour of a creditor who had agreed to accept and did accept a composition made with the creditors by the debtor. Until the death of the testator the premiums were paid by the creditor and repaid to him by the debtor. Lord Romilly held that the burden of proof that the benefit of the policy came to him lay upon the creditor although it stood in his name.

In re Policy 6402, Scottish Equitable Life Assce. Co. [1902] 1 Ch. 282, a policy was taken out by A. on his own life "for the behoof of B," his wife's sister, and the policy provided that B., her executors, administrators and assigns should be entitled to receive the policy moneys on A.'s death. A. survived B, retained the policy, and paid the premiums till his death. It was held by Joyce, J., after a discussion of the authorities, that the legal personal representatives of B. were trustees of the policy for the legal representatives of A.

The only exceptions to the rule above stated—that prima facie there is a resulting trust in favour of the purchaser who pays the purchase money but takes the purchase in the name of another—seems to be cases where that other party is the child or the wife of the purchaser or is one to whom he stands in loco parentis. I can find no decision in which the exception is extended to the case of a purchase by a child in the name of a parent.

"The Life Insurance Act" of this province, R. S. M. 1913, ch. 99, contains no provision which secures to a father or mother the benefit of life insurance effected by a child upon his own life. By sec. 15 of the Act the child is enabled to revoke in the manner pointed out in the section the benefit of an insurance previously expressed to be for his father or mother, but the statute does not extend its protection to insurance for the benefit of a father or mother. There is nothing in the statute which interferes with the application of the principle of resulting trust to the case now under consideration. The evidence, such as it is, instead of rebutting the presumption of a trust tends strongly, in my opinion, towards establishing a trust.

It is pointed out that the policy in question was issued by an association in Ontario and that the contract of insurance

is subject to the laws of that province. That law permits insurance by a son for the benefit of his mother and creates a trust in her favour as beneficiary: R. S. O. 1897, ch. 203, sec. 159. But this, it appears to me, although giving her the right to receive the money and to hold it against creditors and others, does not prevent the creation of a further trust either by agreement or by operation of law in this province respecting the money when it came to her hands. Both mother and son resided in Manitoba when the insurance was effected and when the rights and liabilities between them came into existence. Each continued to reside here until the time of death. As between the mother and the son or his personal representatives, the laws of this province must be applied in ascertaining their respective rights. Although the contract of insurance is governed by the laws of Ontario. the laws of Manitoba should, I think, be applied both in regard to the question of a resulting trust and also in regard to the equitable doctrine of performance which I am about to discuss.

There is the further phase of this case which is dealt with in the judgment appealed from,—that the insurance must in equity be presumed to have been effected in fulfilment pro tanto at the indebtedness from the son to the mother which existed at the time the policy was taken out. In other words, the contention of the defendants is that the equitable doctrine of performance, or performance pro tanto, may be invoked by them against the contention that Mary Ann Inman was entitled to receive both the insurance money and the amount of the advance repayable by Herbert Inman. The learned Chief Justice of the King's Bench was of opinion that the equitable doctrine of performance did not apply in this case.

He discusses the nature of Herbert Inman's obligation with respect to the $4,000, so as to ascertain when the indebtedness was repayable, and states the following proposition:—

"If it accrued due during the lifetime of Herbert Inman, a provision for payment at or after his death could not be regarded as a performance of the obligation to pay at an earlier date. It is stated in 13 Hals. 141, that, 'The principle' (i.e., of performance) 'does not apply where the money has become due in the covenantor's life, so that an action would have been brought for breach of covenant.' Citing Lee v. D'Aranda, 3 Atk. 420; 26 E. R. 1042."

An examination of the cases given as supporting this statement by the text writer shews that it is to be confined to cases where the obligation accrued in the lifetime of the obligor who died intestate without performing it, and where the obligee, as one of his next of kin, received a share of the intestate's estate sufficient or more than sufficient to pay the obligation. The cases cited in Halsbury are Oliver v. Brighouse, unreported but mentioned in Lee v. D'Aranda, 3 Atk. 420 and Lang v. Lang, 8 Sim. 451. The first was a case in which a husband had made a covenant to lay out a sum of money for his wife within a time which expired during the husband's life. It was held that she was entitled to the provision and also to a distributory share of the husband's personal estate. In the second case there was a stipulation in a settlement made before marriage by which the husband was to invest a sum of money for his wife's benefit and if he did not do so during his life she was to be at liberty to take it out of his assets at his death. He died intestate without making the settlement and his wife was held to be entitled to take the amount agreed to be settled and also rceeive her distributive share of the residue. The statement in the textbook must be confined to the principle enunciated in the above decisions, and cannot therefore have any application to the present case. In this connection I would refer to Pomeroy's Eq. Jur. vol. II. sec. 585.

Th learned Chief Justice came to the conclusion that Herbert Inman's obligation was "to pay to his mother's representatives $4,000 after her death." All the evidence that has any bearing on the matter is contained in the writings and this evidence is so meagre that I cannot find anything which, in my opinion, would justify a finding as to when the $4,000 was, if ever, to be repayable. It appears, as the most probable inference, that no time was set for repayment. There is an admission of indebtedness to the mother, and if a valuable security has been given to her by the son the presumption is that it was intended to be applied pro tanto as a part performance. See Pomeroy's Eq. Jur. vol. II. secs. 578, 579.

The fact that Herbert Inman made no provision in his will for an abatement of interest after his death when the insurance money would fall in, does not appear to me to seriously affect the question. He provides for payment to

his mother of $280 per annum during her life "such payment being the interest on $4,000 reckoned at 7 per cent. per annum." This is quite consistent with the intention that if the $4,000, or a part of it, should be received by the mother from his assets, the interest on the whole or on the part received should cease. Where mother and son stand in the relationship of creditor and debtor, as must be found in view of the admission, it would be very unreasonable and scarcely credible that he presented her with the insurance as a gift. The language of the memorandum plainly enough, as it appears to me, shews that the son's intention was not to give to his mother absolutely the corpus of the fund arising from the insurance. At the most she was to have the interest only for life, according to the intention there expressed. She having received and detained the whole amount, it should be deducted from the indebtedness of her son to her.

I would allow the appeal and enter a verdict for the defendants.

CAMERON, J.A.:—Herbert Inman, who died November 17th, 1904, had effected an insurance on his life with the Odd Fellows Relief Association, June 23rd, 1898, for $2,000. At this time, and for two years prior thereto, there was an indebtedness from Inman to his mother of $4,000. The mother, Mary Ann Inman died September, 11th, 1908. On the indebtedness of $4,000, there was paid $2,000 by the executors of Herbert Inman in March, 1908. The question before us is whether the proceeds of the policy are to be applied on the indebtednss aforesaid or are to go to the executors of the mother without regard thereto. The Chief Justice of the King's Bench held that the insurance was a gift from Herbert Inman to his mother and gave judgment for the plaintiffs, her executors, against the defendants, executors of the son.

The policy, or certificate of membership, was issued by the Odd Fellows Relief Association, which was incorporated under the provisions of ch. 34 of the Statutes of Ontario, 37 Victoria.

This Act contained a provision, sec. 10, providing for the payment of the money payable under the rules of the society, incorporated thereunder, to the person entitled and that such money should be to the extent of $500 "free from all claims by the personal representatives or creditors of the

deceased." The above sec. 10 appeared in the Ontario revision of 1877, but in 1878, by 41 Vict. ch. 8, sec. 18, it was repealed and it was thereby provided that when any sum of money becomes payable under the rules of the society it shall be paid to the person entitled under the rules "and such money shall be, to the extent of $2,000, free from all claims by the personal representative or creditors of the deceased." This section was carried into the revision of 1887 and appears in the same form in the revision of 1897. (Sec. 12, ch. 211, R. S. O. 1897). See Cameron on Life Insurance, pp. 227, 228, 229. This provision is to be found, in substance, in sec. 159, ch. 203 of R. S. O. 1897 to which I refer more fully later.

Under its constitution, the association has its office at the city of Kingston in that province, and its board of directors consists of residents of that city. Applications for membership are regulated by Art. VIII. of the by-laws and are to be made to the officers of the association and to be accepted or not by the board of directors. If the applicant be accepted the board of directors shall issue to him a certificate of membership which is subject to the conditions set out in Art. IX.

Under the by-laws of the association, the limit of benefit payable is fixed at $2,000. By Art. XI. the member shall name the person to whom the beneficiary fund is to be payable, who shall be "one or more members of his or her family, or who shall be related to him or her by blood, or who shall be dependent on him or her . . . and no member or applicant for membership shall be permitted to name any creditor as his or her beneficiary." By sec. 2 of the same article, provision is made for changing the beneficiary (subject to the provisions of the Ontario law) and by sec. 3, the assignment of a certificate as collateral security for debt is forbidden.

The claim arising under the certificate is payable at the head office of the association at Kingston, Ontario, Art. IX. sec. 15. Before payment of the certificate proofs of death, with a copy of the letters of administration or probate must be furnished the association, whereupon, and upon production of the certificate, the same shall be paid within 90 days, sec. 19. Upon satisfactory proof being sent to the secretary the executive of the association shall cause his warrant to be

issued in payment to the beneficiary of the amount stated in the certificate, Art. X. sec. 4.

The certificate reads that the association will upon the death of the member, "after notice and proof, and acceptance of proof of said death, in accordance with the by-laws, rules and regulations of the association, pay to Mary A. Inman" the amount to be paid by the association.

It was urged for the defendants that the naming of the mother as beneficiary cannot be construed as a gift to her. There was an indebtedness from the son to the mother; "Equity imputes an intention to fulfil an obligation," and a man must be just before he is generous. It was contended that the decisions of the Courts relating to performance, rather than those relating to satisfaction, governed this case. The proceeds of the policy should, therefore, be applied on the indebtedness.

On the other hand, it was argued that the case is one of satisfaction and that the benefit under the policy cannot be considered a satisfaction in part of the obligation to pay the indebtedness inasmuch as the policy and the debt were payable at different times.

Various other distinctions between the nature of the debt and that of the benefit under the policy were pointed out, and it was argued that the proceeds of the policy ought not to be applied in payment of the debt.

Upon consideration of the various authorities which were referred to and discussed upon the argument, it would seem to me that this case might in some aspects be considered as one of performance rather than one of satisfaction. The distinctions between the two rules appear to be somewhat arbitrary and the rule as to satisfaction and the exceptions thereto have been termed unsatisfactory by high authority. But there are other considerations arising in this case which, in my humble opinion, must be dealt with to enable a conclusion to be reached.

The contract having been made in the province of Ontario, where also it was to be performed, the proper law applicable to this contract, as to its construction and effect, must be the law of Ontario: Dicey, Conflict of Laws, 563, et seq. "The broad rule is that the laws of a country where a contract is made presumably govern the nature, obligation and the interpretation of it, unless the contrary appears to be the expressed intention of the parties." Jacobs v. Credit

[illegible], 12 Q. B. D. [illegible]. [illegible] intention expressed that [illegible] tario are to govern. [illegible] the contrary.

The obligations [illegible] by the Associations shall [illegible] free from all claims by the [illegible] tors of the deceased. [illegible] was paid pursuant to [illegible] obligations.

Here we have a [illegible] J.A., in Re Mills, [illegible] O. R. [illegible] policy was payable to a [illegible] provisions of the Ontario [illegible] with.

The provisions [illegible] of the mother [illegible] Vict. ch. [illegible], sec. [illegible] own, was confined to [illegible] vided that any persons [illegible] under the contract [illegible] favor of the mother [illegible] to the mother under any [illegible]

> the trust [illegible] insured or be subject [illegible] in Ontario, [illegible] vision is merely [illegible] sec. [illegible], ch. [illegible], R. S. O. [illegible] with husband, wife, [illegible] legal beneficiary" [illegible] right of appointment [illegible] create a trust and [illegible] payable thereunder [illegible] insured or his [illegible] Now in Re Mills, [illegible] payable to a [illegible] a person's life to [illegible] to wives and children [illegible] something more, [illegible] law). The words of the [illegible] exception of advancements. [illegible] filial interest on the part of [illegible] money, were such as [illegible]

"And inasmuch as against a statute a resulting trust cannot arise by implication, neither should it be open to parties to shew facts tending to thwart its policy and intention," pp. 566, 567.

I confess I cannot avoid yielding to the force of this reasoning. It seems to me, therefore, that under the governing statute the mother in this case took a vested interest from the day of the issue of the policy and that any notion of a beneficial interest on the part of the insured or of his estate is excluded.

In my view, the memorandum in Inman's hand-writing, which was put in evidence, is of little or no value. It purports to be a declaration of what a new will to be made by him is to contain. It is undated and the date cannot be fixed except that it must have been made after the policy was taken out. At any rate, he did not revoke that direction or reapportion the benefit by will or otherwise in accordance with the rule of the society. As to the admissibility of such evidence, I refer to Re Mills, supra, per Moss, J.A., at p. 566. If expressions of intention before effecting the insurance would be inadmissible, then surely expressions of intention after the policy is completed cannot be regarded as having evidential or other value, unless such expressions are in the form and to the effect prescribed by the rule and the governing statute, and there has been no contention that that has been done in this case.

Herbert Inman was no doubt familiar with the terms of the certificate and with the rule of the association forbidding the naming of any creditor as a beneficiary. It can further be presumed that he had knowledge of the legislation under which the association was incorporated, and by which its operations were controlled. By the rules and the legislation the proceeds of the policy could not be made available to a creditor, or form part of his estate. The probabilities are, therefore, that he did not intend to contravene that rule or legislation; but intended his mother to receive the full benefit of the policy, irrespective of his indebtedness to her.

In my opinion, based on the forergoing grounds, the moneys in question were properly paid to the mother and they were and are free from any claim by the representatives of the son that they should be applied in payment of his indebtedness to her.

I think the appeal must be dismissed with costs.

HAGGART, J.A.:—The fact that there was a formal admission on the record of a debt amounting to $4,000, by the personal representatives, and the payment of $2,000 on account thereof, was pressed very strongly by counsel for the defendants as a determining factor in the case before us. I do not think that the personal actions of the representatives of the mother and son should be taken into consideration in determining what was the intention of the parties at the time of the making of the advance by the mother and of the effecting of the insurance by the son.

The inference I would draw from all the facts and circumstances is that the respective contractual rights and obligations were not present to the minds of the parties at the time of the transactions in question. I think that in both cases the motive was bounty.

I do not attach so much importance to the memorandum that was admitted by both parties as being in the handwriting of Herbert Inman. The most that can be said of it is that it was a declaration of a testamentary intention never carried into effect, and it is not proven when that intention was declared, and he may have subsequently declared, either in writing or verbally, other testamentary intentions. The question with us is what was the intention of Herbert Inman at the time of effecting the insurance.

Mr. Wilson, with much force, urged the equitable principles of presumption, performance and satisfaction, but I think the intimate relations of kinship and the natural love and affection of the mother and son for each other as evidenced in all their relations, was the real consideration for the transactions in question.

I would affirm the judgment of the Chief Justice of the King's Bench and dismiss the appeal.

Appeal dismissed; PERDUE, J.A., *dissenting.*

MANITOBA.

NOVEMBER 30TH, 1914.

COURT OF APPEAL.

SWANSON v. THOMAS.

Principal and Agent—Husband and Wife — Husband Empowered by Wife to Purchase Property for Her and to Transfer Her Land in Part Payment — Husband Has Only Ordinary Powers Incident to Transaction — No Implied authority to Pay Commission to Agent of Vendor.

Held, **that the bare fact that a woman empowers her husband to buy property for her, and to agree to transfer her land in part payment therefor, does not give him implied authority to agree, on her behalf, to pay to the person, whom she knows only as the agent of the other party, a commission as if he were her agent selling the land.**

Appeal from the judgment of the Judge of the County Court in favour of plaintiff in an action brought to recover from Luther and Nellie Thomas, defendants, the unpaid balance of a note for $200 given by Luther Thomas to plaintiff as commission for finding a purchaser of the property of Nellie Thomas, his wife.

The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON, and HAGGART, JJ.A.

H. M. Hannesson, for defendant, appellant.

H. A. Bergman for plaintiff, respondent.

HOWELL, C.J.M. (dissenting):—I have read the judgment of my brother Cameron in this matter and I come to the same conclusion.

The husband, acting really for his wife, desired the assistance of the plaintiff in carrying out the transaction and admits saying to him, "If you help me make this deal I will pay you off-side." Perhaps he meant by this "off-side" that the plaintiff should get commission on the exchange as if agent for each of the parties. The plaintiff swears he did not know that the wife was the owner of the property and apparently the Judge believed him. The wife

conveyed her property in part payment of the livery stable property of which she, through these negotiations, became the owner. The husband, when acting as a principal, but really as agent for his wife, promised the plaintiff to pay a commission for his assistance in carrying the transaction through. The plaintiff, thinking the husband was the principal took his note and afterwards claimed against the wife. I think he had a right to claim against her and that the principles laid down in Thomson v. Davenport, 2 S. L. C. Rule 1, at page 391, and in Calder v. Dobell, L. R. 6 C. P. 486, apply.

The plaintiff, however, has no right of action against both parties and if the husband had appealed the judgment against him would have been set aside as was done in Davidson v. McLellan, 32 O. R. 382, a case in many respects resembling this one.

I would dismiss the appeal.

RICHARDS, J.A.:—The plaintiffs, being employed, by parties named Johnson, to procure a purchaser for a livery stable and business at Arborg in Manitoba, advertised it for sale.

The defendant, Luther Thomas, saw the advertisement and negotiated with the plaintiffs to buy. On 4th March, 1913, he entered, in his own name, into a written agreement with the Johnsons to buy the property for $7,800, "payable . . . by transferring to the parties of the first part" (the Johnsons), a named quarter section of land, "at five thousand six hundred dollars ($5,600) . . . and the balance of twenty-two hundred ($2,200) as follows," stating amounts and times of instalments making up the $2,200 with interest.

On 10th March, 1913, the agreement was carried out by the Johnsons delivering possession and entering into a formal agreement to convey the livery stable and business to Luther Thomas' wife, Nellie Thomas, who was the real owner of the quarter section, and she conveyed the quarter section to the Johnsons, and secured to them the postponed payments, making up the balance of $2,200 and interest.

Swanson claimed from the Johnsons a commission on the sale of the livery stable and business, and was given, and accepted, their promissory note for $600 in settlement.

During the preliminary negotiations the plaintiff Swanson claimed from Luther Thomas a commission on the trans-

fer of the quarter section, as if he were selling it as Thomas' agent. Thomas agreed to pay one, and the amount was fixed at $200, for which Luther Thomas, on 8th March, 1913, gave the plaintiffs his promissory note, payable three months after date.

When Swanson took that note he did not know that Nellie Thomas owned the quarter section, or was the intended purchaser. But a day or so later, when the final agreement was being made, or had just been made, he learned that fact.

On 17th July, 1913, Luther Thomas paid $50 on the note, the balance of which is still unpaid. Swanson made no claim against Nellie Thomas for payment of the commission till after January, 1914.

Mrs. Thomas took no part in the negotiations, but left the matter entirely in her husband's hands. She knew that he, as her agent, was bargaining for the livery stable and business, and that he was agreeing to transfer her quarter section in part payment. She did not agree, or authorize him to agree, to pay a commission, and she had no notice or knowledge, till after January, 1914, that he had been asked, or had agreed, to pay one.

This action was brought to recover from both Luther and Nellie Thomas $150, the unpaid balance of the $200, that Luther had so agreed to pay. Luther did not defend the action but Mrs. Thomas did.

The learned trial Judge gave judgment against both defendants for the amount claimed, holding that the husband had absolute authority from the wife to do anything that he did. From that decision Nellie Thomas has appealed.

In stating the facts of the case, I have, for the purposes of this judgment, credited the plaintiff's story as against that of the defendants, wherever there has been a conflict of testimony, and have done so because of the learned trial Judge's finding, though I cannot say that a perusal of the evidence would, but for his finding, have led me to that conclusion as to all matters in dispute.

Assuming that it is a case where it would be open to the plaintiff, in spite of his having taken the $200 note, to proceed against the undisclosed principal, and further assuming the facts to be as mentioned above, the question, I think, may be shortly stated thus:

Does the bare fact that a woman empowers her husband to buy property for her, and to agree to transfer her land in

part payment therefor, imply authority to him to agree, on her behalf, to pay to the person, that she knows only as the agent of the other party, a commission, as if he were her agent selling her land?

Such implied authority can go no further than to give him power to do what would ordinarily be expected as an incident of such a transaction. I cannot see anything in this case that should suggest to her that a commission would be claimed from her. She knew that the plaintiffs were the Johnsons' agents. She had no reason to suppose that they would claim to have been hers.

With deference, I cannot agree with the learned trial Judge that there was an implied authority, from Nellie Thomas to Luther Thomas, to agree to pay a commission. In the absence of an express authority, which is not suggested by anything in the evidence, I think the implication is that there was no authority to him to so agree.

I would allow the appeal with costs, and amend the entry of judgment in the County Court by making it a judgment against Luther Thomas only, and by entering judgment of nonsuit in favour of the defendant Nellie Thomas against the plaintiffs with costs.

PERDUE, J.A.:—The plaintiffs, who are real estate agents, sue Nellie B. Thomas for commission for finding a purchaser of a quarter section of land belonging to her. She is a married woman and her husband, the defendant Lou Thomas, conducted certain negotiations with parties named Johnson, and with the plaintiff, who was their agent. These negotiations resulted in an agreement which was reduced to writing, whereby the Johnsons agreed to sell their livery business to Lou Thomas for a certain sum of money, payable by Lou Thomas transferring to the Johnsons the above-mentioned quarter section of land and paying the balance of the purchase money by instalments. This agreement was executed under seal by the Johnsons and by Thomas. It was not disclosed at the time that the defendant Nellie B. Thomas was the owner of the quarter section, or that she had any interest in the agreement. The transaction was, however, carried out by Mrs. Thomas conveying her land to the Johnsons and receiving a conveyance to her of the livery stable, etc., mentioned in the agreement.

Swanson states that Lou Thomas agreed to pay commission on the sale of the quarter section, and Thomas says he agreed to pay personally a commission of $200. Some days after the preliminary agreement had been executed Lou Thomas signed a promissory note in favour of the plaintiffs for $200 as their commission, and he afterwards paid $50 on account of this note.

J. J. Swanson, the member of the plaintiffs' firm who brought Thomas and the Johnsons together, states positively that Mrs. Thomas' name was not mentioned in connection with the commission or in connection with the note prior to the signing of the note. Thomas, on the other hand, says he told Swanson that his wife owned the land and would not pay a commission. Swanson's evidence shews that the agreement as to commission was made by Lou Thomas, who personally agreed to pay it, no mention being make of his wife. Thomas apparently agreed to pay a commission himself as a concession to Swanson, Thomas being anxious to see the transaction go through. Both defendants state that the husband had no authority from the wife to agree on her behalf to pay commission. No claim for commission was made against the wife until a considerable time had elapsed after the dishonour of the note given by the husband.

Upon the note being dishonoured the plaintiff's brought this action to recover the balance of the commission from Nellie B. Thomas or from both defendants. A claim is also made against Lou Thomas upon the promissory note.

The learned County Court Judge entered a verdict against Nellie B. Thomas on the ground that the husband had authority from his wife, "and that he did it practically on his own behalf, presumably for his wife."

In considering this case one must bear in mind that there are two separate and distinct contracts indicated in the evidence: first, the contract with the Johnsons involving a sale or exchange of Nellie B. Thomas' land; secondly, the contract to pay a commission to the plaintiff. Ratification, or rather adoption of the first contract by Mrs. Thomas was not a ratification of the second contract which was one made between her husband and a third party, the plaintiffs. The plaintiffs were the agents of the Johnsons who advertised the livery business for sale. Lou Thomas went to them to purchase it. The transaction that resulted involved the transfer of the wife's quarter section to the Johnsons at a

stated value. The plaintiffs, although they were receiving a commission from their own principals, sought also to obtain a commission on the sale of the quarter section of land. There cannot be any contract that she would pay a commission to the plaintiffs implied from the circumstances. It rests upon the plaintiffs to prove a contract to pay. The argument advanced for the purpose of inferring such a contract is that the husband was authorized by the wife to enter into and carry through the transaction with the Johnsons, and that therefore it must be inferred that, as incident to that authority, he had power to bind her to an agreement to pay commission to the plaintiffs. But if we take Swanson's own evidence as expressing the true facts (a position to which the plaintiffs cannot reasonably object) Mrs. Thomas' name was not mentioned in connection with the transaction prior to the signing of the note, and the agreement as to commission was that the husband would personally pay it. Thomas did not say to Swanson that he agreed on behalf of his wife or on behalf of the owner of the land to pay commission. Swanson dealt with Thomas as the principal, and had no reason to believe that Thomas was acting for anyone else. It is positively denied by both the defendants that Mrs. Thomas was ever consulted or gave any authority to her husband to bind her to pay commission, and there is no evidence to the contrary.

Further, I think, that the contract, made as it was and under the facts as shewn, was not capable of ratification by Mrs. Thomas so as to make her liable to be sued upon it, even if there were evidence of an attempt at ratification. As authority for this, I would refer to the decision of the House of Lords in Keighley v. Durant, [1901] A. C. 240, in which the doctrine of ratification is dealt with fully and it is laid down that a contract made by a person intending to contract on behalf of a third party, but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.

Under no aspect of this case can I find that Nellie B. Thomas, either by agreement or by her conduct, made herself liable to the plaintiffs for the commission claimed.

I would allow the appeal with costs and enter a nonsuit with costs in the County Court as against Nellie B. Thomas.

CAMERON, J.A. (dissenting) :—The plaintiffs sue the defendants, husband and wife, for a commission on the sale of a quarter section of land in Saskatchewan, owned by Nellie Thomas, the wife. The action is against the defendants jointly, against each of them separately and, lastly, against the husband on a promissory note for $200 given for the amount of commission agreed upon. The plaintiffs published an advertisement for the sale of a livery business at Arborg owned by three persons named Johnson. Lou Thomas saw this and came to Winnipeg to see the plaintiffs and, after John J. Swanson, one of the plaintiffs, and he had made two trips to Arborg, they completed an agreement which Swanson drew up, March 4th, 1913, and had signed by the Johnsons and L. Thomas. The agreement was signed on its date. This agreement was entered into subject to an inspection of the farm which was made by one of the Johnsons, accompanied by Lou Thomas. They returned March 8, the parties discussed the agreement and certain alterations were made in it, including an increase in the amount of the expressed consideration from $7,300 to $7,800. The land was taken at $5,600, and the balance $2,200 was made payable $550 on March 4th, 1914, $500 September 4th, 1914, $600, March 4th, 1915, with interest at 7 per cent.

Swanson made an agreement with Lou Thomas as to the amount of commission which was fixed at $200 for which Thomas gave the promissory note sued upon, dated March 8th, on which $50 was paid July 17th, 1913.

In carrying out the agreement a conveyance of the quarter section was made by Mrs. Thomas and a bill of sale of the livery stable property made to her. At the time of the giving the note Swanson says he did not know who was the owner of the quarter section.

It appears that the Johnsons agreed to pay a commission and paid it in part. Of this fact Thomas was aware. Swanson says a commission was discussed between Thomas and himself before he gave the note.

Mrs. Thomas explicitly denies authorizing her husband to agree to pay any commission, and says she never heard of the commission until after the payment of the $50, and that no demand was made on her for it until the commencement of the action. She says she left the matter in her husband's hands and had him act for her throughout.

Lou Thomas states that he told Swanson the farm belonged to his wife "from the start," also that he promised to pay the commission "off-side." "I gave him the note and told him I would pay him." "I told him that my wife wouldn't pay him a cent. I said it was her property; I was making the deal and I would pay him off-side," and this before he gave the note.

Swanson, on being recalled, gave a definite denial to these statements.

The learned County Court Judge held that the husband had authority from the wife and gave judgment for the plaintiffs for $156.30.

It is argued that the plaintiffs having accepted the note of Lou Thomas for the commission and extended the time for the payment thereof have elected their remedy and cannot now hold the defendant Nellie B. Thomas. The husband was here clearly agent for his wife and no proceedings short of judgment against the agent are conclusive proof of election to charge the agent exclusively. I do not consider this case comes within the decisions referred to in Bowstead on Agency, p. 312 et seq., to several of which we were referred. I would not draw from the facts here that the plaintiffs had elected, with knowledge, to accept the liability of the husband to the exclusion of that of the wife. In view of the judgment of the trial Judge, we must accept the plaintiffs' version of the facts. The promissory note is merely a conditional payment and their acceptance of, and dealing with, it does not necessarily preclude the plaintiffs from enforcing their claim against the wife.

In this matter the wife was represented by her husband throughout. She ratified the transaction and executed the necessary conveyance. The husband knew that the plaintiffs were representing the Johnsons and knew that they (the Johnsons) were liable to pay a commission. The trial Judge has found that the husband had full authority from the wife to do what he did in agreeing to pay a commission. It was certainly open to him to come to that conclusion, though, to do so, he had to reject their statements as to the husband's authority to pay or agree to pay a commission. The wife admitted that she had left the matter in the hands of her husband and that he had acted for her throughout. From this, and from the evidence generally, the learned County Court Judge held that the interests of the wife and husband

were identical and that the husband had sufficient authority to bind his wife in the matter of a commission. In view of all the circumstances, I am not prepared to reverse his finding.

HAGGART, J.A., concurred with PERDUE and RICHARDS, JJ.A.

Appeal allowed; HOWELL, C.J.M., *and* CAMERON, J.A., *dissenting.*

MANITOBA.

NOVEMBER 30TH, 1914.

COURT OF APPEAL.

HARRIS v. WHITEHEAD.

Sale of Goods—Automobile—In Possession of Purchaser at Time of Agreement of Sale—Note in Payment — Construction of Clause In—No Unequivocal Words Shewing Retention of Ownership by Vendor—Not a Lien Note—Right of Vendor to Re-take Possession Until Payment —No Actual Retention—Equitable Pledge — Innocent Purchaser For Value Without Notice—Replevin—Loss of Use of Automobile — Nominal Damages — County Courts Act, sec. 231.

Plaintiff agreed to sell his automobile to defendant W. in whose possession it was at the time of said agreement. W. gave to plaintiff in payment a document in the form of a promissory note containing the following clause which was inserted by plaintiff before the document was signed: "This note is in payment for car No. 7100 & 150 license &c., and is to remain in possession of owner until paid for." Plaintiff did not express to W. an intention to retain the ownership and W. did not know of any such intention.

Held, that the document was not a lien note since the clause inserted therein was not an unequivocal provision shewing the plaintiff's retention of ownership, but that it simply gave the plaintiff the right to re-take possession at any time before payment; that the said right, at the most, amounted to an equitable pledge in the vendor's favour and was of no avail against an innocent purchaser for value to whom the ownership had passed.

Appeal from the judgment of a Judge of the County Court in favour of the plaintiff in an action of replevin.

The appeal was heard by RICHARDS, PERDUE, and HAGGART, JJ.A.

H. J. Symington, for defendant Milord, appellant.

Honeyman and Thomas, for plaintiff, respondent.

RICHARDS, J.A.:—The plaintiff, who owned an automobile, which was in Whitehead's possession, agreed to sell it to him, Whitehead, for $550, and Whitehead gave plaintiff his note for that amount, payable at 60 days after date.

On the note form, before it was signed, there was written by plaintiff after the ordinary wording of the note the following:—

"This note is in payment for car No. 7100 and 150 license and is to remain in the possession of owner till paid for."

The plaintiff swears that before he took the note he tried to find a lien note form to use, and that he could not find one, and so wrote the above into the note, supposing it would have the same effect as a lien note. It does not appear that he told Whitehead of his intention to retain the title, or ownership, or that Whitehead agreed to, or knew of such intention.

The plaintiff thereafter made no attempt to get possession of the car. While in Whitehead's possession it was sold by him, Whitehead, to Mr. Lee, and by the latter to the defendant Milord, who paid part at least of the price in cash.

The plaintiff thereafter brought this action, one of replevin, and thereby got, and has since retained, possession of the car.

The defendant Milord denied the plaintiff's title and counterclaimed for damages for the loss of user of the car. The learned trial Judge gave judgment for the plaintiff and the defendant Milord appealed.

The plaintiff relies on the use of the word "owner" in the clause above quoted from the note, as implying that he was to retain the title and ownership. He was the owner at the time he wrote that on the face of the note, but I do not see that we should imply anything further than that from the writing.

An ordinary lien note simply provides that in spite of the sale the property, title and ownership shall not pass to the purchaser but shall remain in the vendor. Now the effect of such a transaction, coupled with the delivery to, or retain-

ing of possession by, the purchaser, is to give the latter that possession of the chattel which is the ordinary evidence of ownership, and which may enable him to sell it, as his own, to an innocent purchaser, which is just what occurred here.

The only way in which the vendor can then justify his re-taking the chattel, is by shewing that the property did not pass from him. In all such cases I would lean against holding that the property in such cases has not passed.

If I am right in that, it becomes necessary for the vendor to clearly shew his retention of the ownership by the use of unequivocal provisions to that effect in the contract of sale. It does not seem to me that the plaintiff has done so in this case. On the contrary, I think the facts shew that he meant to part with the ownership, or title, but to retain a right to re-take possession if he wished. Such a bare retention, without actual re-taking of possession, would, in the case of the ownership having passed to Whitehead, be of no avail as against an innocent purchaser for value to whom the ownership again passed, as I think it did in this case to the defendant Milord.

The bare agreement that possession might be taken, did not constitute a mortgage, or an agreement to mortgage, as even if such possession had been taken, the title would have remained in Whitehead. At the utmost, it was an agreement for a pledge of the car, by Whitehead to the plaintiff. But, as there was no delivery of possession, no pledge, except possibly an equitable one, was created; and, though an equitable pledge might be good as between the parties to it—as to which I express no opinion—it could not prevail as against an innocent purchaser for value.

The evidence as to damages, suffered by the defendant from being deprived of the use of the car since action begun, is too vague to be of any use. He says he thinks he should recover $3 per day, but does not shew that he was put to any expense or suffered actual loss. I agree that the damages should be nominal only.

My brother Perdue's judgment sets out fully the disposal to be made of this appeal, in which disposal I concur.

PERDUE, J.A.:—This is an action of replevin to recover a motor car. The facts are as follows:—

In November, 1913, the plaintiff sold the motor car to the defendant Whitehead. Whitehead gave the plaintiff a

document in the form of a promissory note for $550, in payment for the car, the note being in the words following:—

"Winnipeg, Nov. 24th, 1913.

$550.00.

Sixty days after date I promise to pay to the order of L. G. Harris at the Sterling Bank of Canada here the sum of five hundred and fifty dollars, value received. Interest at seven per cent. This note is in payment for car No. 7100 and 150 license and is to remain in the possession of the owner until paid for."

(Sgd.) T. P. Whitehead,
57 Victoria St., Wpg."

At the time the sale was made the car was in the possession of Whitehead and had been in his possession and use for some months. The plaintiff pressed him to return the car and then Whitehead offered and agreed to buy it. The plaintiff expected to receive cash but Whitehead would only give his note at 60 days. The plaintiff says he tried to find a form of lien note but not finding one he drew up the above note intending it to be a lien note. The plaintiff says Whitehead promised to restore to him the possession of the car but did not do so, and it remained in the possession of Whitehead continuously after the sale until he sold it to a person named Lee. Lee sold the car to the defendant Milord, who had no notice of the plaintiff's claim. The note was not paid and in September, 1914, the present action of replevin was commenced against Whitehead and Milord.

If the doubtful expressions in the agreement written into the note are interpreted in accordance with the construction most favourable to the plaintiff, the agreement was that the car should remain in the plaintiff's possession until paid for. There is nothing in the writing saying that the ownership of the car should remain in the plaintiff or that the title to, or the property in, the car should not pass to Whitehead, and there does not appear to have been any verbal agreement to that effect. The plaintiff states that he sold the car to Whitehead and took the note in payment but was to have possession of the car until it was paid for. At that time Whitehead had possession and continued to retain possession. The real transaction appears to have been this: The plaintiff agreed to sell the car, the purchaser being already in possession of it; the purchaser agreed to restore the possession to

the plaintiff as security, but never did so. I think the effect of this, that the ownership or property in the car passed to the purchaser and that the plaintiff had the purchaser's promise to pledge the car with the plaintiff as security for the price. But no pledge was ever actually made, because the possession of the property to be pledged must, in order to create a valid pledge, pass from the pledgor to the pledgee or to some one for him: 31 Cyc. 787; Add. Con. 11th ed., 817-818. No doubt there may have been a valid agreement enforceable as between the plaintiff and Whitehead that the latter should restore possession to the plaintiff in order that it might be held as agreed, but such an agreement is not enforceable against a purchaser for value without notice, as Milord must be held to be.

The law governing the plaintiff's rights are very succinctly stated in 31 Cyc. p. 797, as follows:—

"Where there is a contract for a pledge which, however, does not constitute a valid pledge because of the lack of some requisite, as the non-existence of the property to be pledged, or a want of delivery, the contract is said to create an equitable pledge which a Court of equity will enforce between the parties and against the general creditors of the pledgor, but not against subsequent bona fide purchasers or pledgees for value." See also Pomeroy's Eq. Jur. sec. 1235, where numerous English authorities are referred to.

The defendant Milord was a subsequent purchaser in good faith, without notice of the plaintiff's rights, and he obtained from Whitehead through Lee the legal title to, and possession of the car. This furnishes a complete answer to the plaintiff's claim: Pilcher v. Rawlins, 7 Ch. 259, pp. 268, 269.

I think the appeal must be allowed with costs and judgment entered for the defendant Milord in the County Court for the return of the car, and that the plaintiff pay to the defendant $5 damages under sec. 231 of the County Courts Act, together with costs of suit in the County Court.

HAGGART, J.A.:—This is an action of replevin for the recovery of a motor car. The plaintiff claims that at the time of the alleged sale to the defendant Whitehead it was agreed that the ownership and possession of the car should remain in the plaintiff until the car was paid for, and further alleges that this agreement was in writing.

The defendant Milord claims to be a purchaser for value without notice, denies that there was any written agreement, and alleges that the plaintiff permitted Whitehead to exercise acts of ownership so that he was able to sell the car to a third party for value without notice, who in turn sold it to the defendant Milord, and that the plaintiff is estopped from setting up acts of ownership against Milord.

The case was abandoned as against the defendant Whitehead. The defendant Milord claims under a sale from Whitehead to one Lee, and a bona fide sale from Lee to himself.

The trial Judge gave a verdict for the plaintiff, from which the defendant Milord appeals.

The plaintiff in 1912 bought a motor car from the Breen Motor Co., which he stored in a garage on Good street in the city of Winnipeg while he himself took a trip to Europe. While the plaintiff was in Europe he received a letter from the defendant Whitehead asking if he, Whitehead, could take the car out, stating that the lamps and other things belonging to it were being stolen. The plaintiff did not reply to the letter. He returned to Winnipeg in November of that same year, when he learned that the defendant Whitehead had taken the car out of the garage and was using it, and that it had been damaged to some extent. Through the Breen Motor Co. the plaintiff learned that the car had been brought to their shop for repairs by Whitehead.

The plaintiff located Whitehead at the St. Regis hotel, where he first met him. The plaintiff subsequently met Whitehead several times and says he continued insisting upon getting some satisfaction for the car. I will give the plaintiff's story as the result of these interviews: "Finally, I said this car belongs to me and I will have to take possession of it in some way" . . . and that Whitehead in reply says, "I will tell you what I will do. I will give you my note for 60 days. I have $9,000 coming in and other resources, and I will pay for it," and further on he proceeds: "I went out to try and find a form of lien note, and could not, and when I came back he came in again and we made the bargain. I wanted $700, and I was finally beaten down to $550. Before this he said he would pay me for it, and made no mention of a note or anything else the first time he was in. Finally he said he would pay $550. Of course I thought that was cash. Then he said he would

give me a note. I tried to find a form of lien note, but could not, and made out a note for him at 2 months which he signed" and the note in question is in these words:—

"$550,00. Winnipeg, Nov. 24th, 1913.

Sixty days after date I promise to pay to the order of L. G. Harris, at the Sterling Bank of Canada here, the sum of five hundred and fifty xx/100 dollars. Interest at 7%. This note is in payment for car No. 7100, and 150 license, and is to remain in the possession of the owner until paid for.

T. P. Whitehead,

57 Victoria St., Wpg."

And proceeding further, the plaintiff says, referring no doubt to the last portion of the document: "I first wrote that in as I could not find a lien note and made it as near a lien note as I could. Afterwards I tried to get hold of the car and could not. When he signed the note he promised to give me possession of the car just as soon as it was repaired, that I could have the car."

These occurrences were about the 24th November, 1913, the date of the note, shortly after which the plaintiff, leaving the car in the possession of the defendant Whitehead, went to Europe again, where he remained until the following summer.

The defendant Whitehead was for some time in possession of the car, wrongfully or rightfully, before the price was agreed on and the note was given, and from that time until the transfer to the present defendant Milord, Whitehead remained in open possession of the motor.

The note was never paid.

It may have been the intention of the plaintiff to retain something in the nature of a lien or stipulation that the property and ownership of the car should remain in himself; but I cannot gather from the document, or from the evidence, that such was also the intention of Whitehead. The note or agreement does not in express terms give the plaintiff a lien or reserve to him the right to get possession of the car. The plaintiff wrote the document himself and it does not appear that at that time there was much serious conversation as to what should be its terms. If the plaintiff has not the security he thought he had, or perhaps might have had if he insisted upon it, it is his own fault. The document itself has not the effect claimed for it by the plaintiff.

I think, under all the circumstances, the defendant Milord receives substantial justice by getting a verdict for the

delivery of the car to him, but in deference to my brother Judges, I agree to a verdict of $5 on his counterclaim.

I would allow the appeal and enter a verdict for the defendant for motor car in question.

Appeal allowed.

MANITOBA.

NOVEMBER 30TH, 1914.

COURT OF APPEAL.

MIGUEZ v. HARRISON.

Jurisdiction—County Court—Action for Specific Performance of Contract for Sale of Land—Damages in Lieu of—Cancellation of Contract on Ground of Abandonment—County Courts Act, sec. 57 (b)—King's Bench Act, Rule 936—Costs.

The County Court has no jurisdiction to entertain an action for specific performance of a contract for the sale of land, nor is it competent to give damages in lieu of specific performance.

The County Court has no jurisdiction to entertain an action for a declaration cancelling a contract for the sale of land, on the ground of abandonment.

Order of GALT, J., 29 W. L. R. 187, set aside.

An appeal from the judgment of GALT, J., 29 W. L. R. 187, who ordered the costs to be taxed on the County Court scale of an action for specific performance for the sale of land, brought in the County Court in which METCALFE, J., gave judgment in favour of plaintiff for damages in lieu of specific performance but made no order as to costs.

J. L. M. Thomson, for plaintiff, appellant.

A. B. Hudson, for defendant, respondent.

The judgment of the Court was delivered by

CAMERON, J.A.:—This action was brought to enforce specific performance of an agreement whereby the defendants agreed to sell to the plaintiff certain land for the sum of $810, payable as therein mentioned. The action was tried before Mr. Justice Metcalfe, who gave judgment for the plaintiff for $141 damages, but made no order as to costs.

The costs were taxed by the taxing officer on the King's Bench scale. From this taxation an appeal was had to Mr. Justice Galt, in whose judgment the facts and pleadings are referred to at length, and the rule (936) of the King's Bench Act, and the sec. (57b) of the County Courts Act which govern the matter in question are set out in full.

The judgment being for $141 damages for breach of the contract sued upon, the learned Judge held that it was a matter within the competence of the County Court and that, therefore, the plaintiff was, under Rule 936 of the King's Bench Act, entitled to County Court costs only, with the right to the defendants to set off.

It appears from the pleadings and the judgment of Metcalfe, J., that the real issue tendered by the defendants was that the agreement sued upon could not be enforced because it had been abandoned by the plaintiff and that that abandonment had been accepted by the defendants. I take it that the judgment of Metcalfe, J., is to the effect that the defendants failed to establish this defence of abandonment and that the plaintiff was entitled to specific performance but that specific performance being impossible, by reason of the defendant's action in disposing of the property, he awarded damages in lieu thereof, and fixed these at the sum of $141, the amount paid by the plaintiff on the agreement which he adopted as the measure of damages.

In the first place, there is no jurisdiction in the County Court to entertain the action for specific performance as brought by the plaintiff. This jurisdiction is expressly excluded by sec. 57 (b) of the County Courts Act.

Nor can there be jurisdiction to entertain in the County Court an action to declare the cancellation of an agreement on the ground of abandonment, which is in reality the relief claimed by the defendants. There is here no allegation of fraud or misrepresentation and therefore the matter could not in any event come within the jurisdiction of the County Court. Had there been such the jurisdiction would be restricted to contracts involving a sum not exceeding $500. Richards v. Trottier, 24 M. R. 473.

In the well known case of Cornwall v. Henson, [1900] 2 Ch. 298, a similar action was brought, the plaintiff asking for specific performance, and damages instead of or in addition to specific performance, or alternatively for damages for breach of contract, or for repayment of the money paid. The

defendant having redered specific performance impossible, he was held liable in damages.

In this present case it seems to me the trial Judge, in effect, found that the defence of an abandonment of the contract had not been established, and that the plaintiff was, therefore, entitled to specific performance. That particular remedy being rendered impossible by the action of the defendants in disposing of the property, he awarded damages against them in lieu thereof, and in ascertaining those damages he took as the measure of them the amounts paid by the plaintiff on this contract so found to be unenforceable. If the defendants had sought to establish by action the abandonment by the plaintiff of the contract and their acceptance thereof, they would not, and could not, have taken proceedings elsewhere than in the King's Bench.

The fixing of damages in lieu of specific performance is a proceeding authorised by the King's Bench Act, and incidental to a form of action not within the competence of the County Court. The governing fact is that the action which had to be tried to determine the rights of the parties could be entertained in the Court of King's Bench and nowhere else. If the land had not been transferred that point would be clear beyond question. That the appropriate relief could not ultimately be granted does not to my mind affect the status of the case as a case properly triable by the King's Bench. If it had been considered in the County Court objection to the jurisdiction would have been inevitable. It is impossible to see how a County Court Judge could have proceeded to try the facts here involved without at once being confronted with questions plainly outside his competence. A simple action to recover $141 would not have been triable without examining the question of the plaintiff's right to have the contract performed and the defendant's default in refusing to carry it out. Nor could the defendant's defence be touched upon without raising the question of cancellation of a contract on the ground of abandonment.

With all due deference, therefore, I reach the conclusion that this action is not of the proper competence of the County Court. I would allow the appeal with costs. The order made by Mr. Justice Galt will be set aside with costs.

Appeal allowed.

BRITISH COLUMBIA.

NOVEMBER 3RD, 1914.

COURT OF APPEAL.

RE FALSE CREEK RECLAMATION ACT.

Arbitration and Award—Award Founded on Incorrect Principle of Law — Apparent on Face of Award — Basis of Compensation—Market Value Before Authorization of Scheme of Expropriation—Value of Lands not Vested in Owners and of Future Interests — Award Set Aside — Arbitrator Acting on Advice of Counsel.

An award will be set aside where it appears on the face of it that the arbitrator has misdirected himself as to the law relating to the valuation of the land expropriated.

Compensation for expropriation should be estimated upon the basis of the market value of the owner's land before the authorization of the scheme of expropriation, and not upon the basis of its value to the taker with the assurance that the property is wanted for an authorized purpose.

An arbitrator's award is bad and must be set aside which allows for lands not vested in the owners or for rights or interests which do not attach to the lands expropriated and cannot in the immediate or even in the remote future be acquired as being advantages that attach to the land.

In Re Arbitration Between Montgomery Jones & Co. and Libenthal Co. (1898), 78 L. J. R. 406, not applied.

Per MCPHILLIPS, J.A.:—An arbitrator in a proper case should act upon the advice of counsel.

An appeal from the judgment of MORRISON, J., refusing to set aside an award but remitting it to the arbitrator.

The appeal was heard by MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER, and MCPHILLIPS, JJ.A.

Douglas Armour and J. B. Hay, for appellants.

Sir Charles Hibbert Tupper, K.C., and G. E. Houser, for respondents.

MACDONALD, C.J.A. (dissenting):—False Creek is an arm of the sea reaching from English Bay into the municipality of the city of Vancouver.

By an Act of the provincial Legislature the municipality was given power to reclaim portions of its bed and shores, and as incidental thereto to purchase and expropriate certain lands abutting on the arm including the lots which are now

in question. The property of the Crown in right of both the Dominion and the province in the bed and shores of the arm adjacent to these lots was by authority of various statutes conveyed to the municipality, to enable it (inter alia) to carry out with the Canadian Northern Railway Co. and the Canadian Northern Pacific Railway Co. an agreement respecting railway terminals. Having failed to agree on the price to be paid for the said lots arbitration was resorted to in pursuance of powers given to the municipality by one of the statutes aforesaid. Mr. Frederick Buscombe was agreed upon as sole arbitrator, and it was further agreed by counsel for each of the lot owners that the evidence with respect to each owner's claim should not be taken separately, but the whole evidence should, to save expense, be taken at once and applied to the different claims as applicable. During the pendency of these proceedings a question of law arose upon which counsel for the municipality desired the arbitrator to state a case for the opinion of the Court, but before the case was stated counsel for all parties agreed upon the point of law and delivered to the arbitrator a letter embodying a statement of it as agreed upon. The question of law had to do with what was called the riparian, but more correctly the littoral rights of the lot owners. The question of law arose by reason of the lot owners' leading evidence to shew that owners of lots abutting on the sea or other navigable waters in the province had generally been recognised by the Crown as having the first equity to acquire the foreshore in front of their lots, and also that there had theretofore been negotiations between the lot owners looking to joint action for the reclamation and improvement of False Creek east of the bridge, being the part of the arm in front of their lots, and it appears to have been contended on their behalf that these were matters which the arbitrator should take into account. This contention counsel for the municipality opposed, and in the letter above referred to insisted:—

"That the riparian rights of the owners of the various lots in question did not in September, 1912" (the date of notice to treat) "include any right to build, dredge or construct any buildings or works as wharves, slips or otherwise below the high water mark.

"We want to be perfectly clear that whatever negotiations there were between the owners of False Creek east of the Main street bridge looking to joint action for reclamation

and improvement of False Creek east of the bridge did not as a matter of law confer upon the owners any further or other rights than those they originally had as owners of the lots abutting on the creek."

In this statement of the law counsel for the owners agreed, and this mode of settling the question of law was acquiesced in by the arbitrator, who then proceeded to make his award.

The appellants moved in the Court below to set the award aside on grounds which may be shortly stated as follows:—

(1) That the arbitrator assumed to adjust the taxes between the parties—a subject not within the submission.

(2) That he exceeded the submission in awarding interest on the sums awarded as compensation, and also in adjusting income derived from the property for the period between the dates of the notices to treat and the date of the award.

(3) That he awarded to himself fees greatly in excess of those to which he was entitled under the Arbitration Act, there being no agreement that he should receive higher fees; and

(4) That he ignored the said statement of the law and included within the boundaries of the lots parts of the foreshore which was not within their boundaries.

The learned Judge whose order is appealed from overruled all these grounds except those relating to taxes, income and fees, and with respect to these items remitted the award to the arbitrator for reconsideration.

The defendants contend that the award should not have been remitted but should have been set aside not only on the grounds which induced the learned Judge to remit it but on all the grounds above stated.

As to the taxes and income, it is I think sufficient to say that the affidavits filed on the motion below shew that counsel agreed that taxes and income should be adjusted by the parties between themselves. There appears therefore to be no reason why the arbitrator should have meddled with them.

The fees which the arbitrator awarded to himself are admittedly greatly in excess of those allowed by statute, and as there was no agreement that he should receive higher fees the learned Judge was, I think, right in his conclusion that the arbitrator was in error.

It remains to consider the other grounds of appeal which were over-ruled.

I think the arbitrator was in error in allowing interest. There is no statutory or other authority in law for doing so in a case like this one, nor did the parties agree to interest being awarded.

The remaining question is that raised in the 4th and last ground of appeal: it is based on this paragraph in the award:

"I do not attach much importance to the variation in depth of the lots on the south side of the bridge for the agreement between the city and the owner of lots 1, 2 and 3 in connection with the widening of Main street by which he was given a quit claim of 120 feet in depth, practically fixed the depth of this tier of lots at the same line, and there can be little, if any, doubt that the owner of lots 5 and 6, would have made with the city an agreement upon terms no less favourable than this neighbour, the owner of lots 1, 2 and 3 had he been prepared to do so, and all these lots are assessed on the same basis by the city."

As I understand the situation with which the arbitrator was dealing it was this, the municipality took some 14 feet from the Main street frontage of lots 1, 2 and 3, and presumably of the other lots in this "tier" for the purpose of widening the street, and gave the owner of lots 1, 2 and 3 a quit claim deed to sufficient of the foreshore to give his lots a depth including this foreshore of 120 feet, presumably their original depth.

The arbitrator appears to have thought that because in his opinion the other lot owners might have obtained similar concessions had they asked for them, they were entitled to have their lots valued on the basis of similar concessions though they had never obtained them.

He appears to have ignored the real boundaries other than these of lots 1, 2 and 3, and to have given compensation in respect of them as though they had a depth of 120 feet including foreshore, which they to his knowledge had not. In doing this he has gone beyond the submission, and has fallen into error which must be corrected either by setting aside the award, or by remitting it for reconsideration with instructions to him to confirm himself to the real boundaries.

In what I have just said I am guided entirely by what the arbitrator has himself said, or what are necessary implications from what he has said in the paragraph above quoted.

Even if I were permitted to look at it we have not before us the whole evidence taken before him. I must accept the facts as stated by the arbitrator where it was open to him to decide what the facts were.

I must therefore take it that the owner of lots 1, 2 and 3 acquired some right, proprietary or otherwise, in the foreshore which the city quitted claim to him beyond the interest which he originally had in that foreshore, and beyond the interest which the other lot owners had in the absence of like deeds.

There are, in my opinion, two objections to the arbitrator's conduct with respect to this lengthening of the lots. He has ignored or misunderstood the law as stated in the letter. If the owner of lots 1, 2 and 3 had a proprietary interest or an interest beyond that which he originally had before the city's quit claim deed was obtained, then in recognizing similar interests in other lot owners which they did not possess he was violating what counsel had agreed should be the limits of the lot owner's rights. Apart from this, and independently of the letter, he was assuming as being within the boundaries of the lots other than 1, 2 and 3, lands, or interests in lands which were without their boundaries.

The power given to the Court by the Arbitration Act to, remit an award instead of setting it aside was intended to remedy a hardship upon parties to arbitrations which theretofore arose from the want of such power. It is a serious matter to overturn all the costly proceedings of an arbitration if it can in justice to all parties be avoided. In this case the error lastly discussed does not affect lots 1, 2 and 3 but only the balance or some of the "tier" of lots referred to by the arbitrator. The error is one which may be easily corrected. As to the error in awarding interest and awarding himself excessive fees, these manifestly can be very easily corrected.

The authorities indicate that awards should now not be set aside if remitting them to the arbitrator would appear to the Court to meet the justice of the case.

Counsel for the appellants very properly said during the argument that dishonesty could not fairly be imputed to the arbitrator. The submission was that the arbitrator had been guilty of judicial misconduct, but they did not go beyond that and suggest a want of bona fides. In these circumstances I think I should be violating sound principles con-

trolling the exercise of judicial discretion if I were to set the award aside rather than remit it to the arbitrator.

I would therefore sustain the order below, but with the additional instruction to the arbitrator to correct the errors respecting interest and boundaries, and to make his award in the light of what I have said concerning them.

The appellants should have the costs of the appeal.

IRVING, J.A.:—As a rule awards ought not to be set aside except on very strong grounds. The parties having selected their tribunal it is highly undesirable that the Courts should do anything to prevent the decision from being final unless for very strong reasons. In False Creek Arbitration (1912), 17 B. C. 290, I dealt with this at some length. But nevertheless I am satisfied that this award cannot stand. There are, in my opinion, many serious errors in it. I agree with the learned Judge that the arbitrator's fees are not authorised. That error could be cured by remitting it back. A more serious error is that the arbitrator has made a mistake as to the size of the lots, and as to rights which pass with them, and has therefore acted ultra vires. Further, I think the arbitrator has misdirected himself as to the law relating to the valuation, and that this appears on the face of the award. The principle of compensation under statutory powers is that the owner should receive the market value of his land, that is to say, he is compelled to exchange his lands as they stood before the scheme was authorised—not its value to the taker with the assurance that the property is wanted for an authorised purpose. In fixing that compensation any and every element of value which the lands possess may be taken into consideration in so far as it increases the value, to the owner, but an enhanced value may not be given because of the sanctioning by Parliament of the very scheme for the carrying out of which the compensation is being authorised. You would defeat the principle of compulsory purchase by compensation if by reason of the fact that the land in question is wanted for a public purpose the price is to be increased.

The following passages from the very well expressed award seem to me to indicate where he has entertained a wrong idea as to fixing the compensation:

"There is to be considered primarily that the owner whose property is being acquired, naturally takes advantage

of the necessity of the purchaser to obtain the highest possible price."

If this means, as I think it does, that the railway company's acquisition of the land was one of the necessities that the owners could take advantage of, the arbitrator was wrong. It is but fair to the arbitrator to say that later on he cuts this down, and it is but fair to myself to say that I don't wish to criticise his award as a whole by what he says in his opening; but it seems to me that in that opening is to be found the germ of his wrongdoing.

Then again, he speaks of the "potential" values of this property. I do not question that the present potential value may be a factor, but the potential values may be too remote at this date to enhance the value of the land which at present is practically unproductive. I am inclined to think that under cover of this vague phrase he has reached a conclusion which the present potential qualities of the place cannot support.

Having found that the lands except two lots are not revenue producing, and that the sales made in the vicinity are not supported by the earning power of the lots sold, the arbitrator considers the enormous increases in values (without regard to revenue) which have taken place in other parts of Vancouver. On this enormous increase, and the potential advantages, and the increased size and attributes of the lands, he fixes the amount of compensation.

On the ground of economy much may be said in favour of remitting the case to the arbitrator, for reconsideration, but I think, having regard to the protest in the letter of 12th December, that the railway company is entitled, if it desires it, to have the award set aside.

I would therefore allow the appeal and set aside the award.

MARTIN, J.A.:—By the order of the learned Judge appealed from he referred back the award to the arbitrator to be reconsidered and amended in so far as it deals with the subject of adjustment of taxes or revenue or both and also in so far as it awards costs and arbitrator's fees and expenses.

I think, however, that the adjustment of taxes and revenue were left by agreement of both parties to the decision of the arbitrator; that is the only fair inference I can draw from what occurred and therefore the award should not be

interfered with on that ground as he was warranted in adjudicating.

As to the arbitrator's fees, I agree that it cannot stand because the arbitrator has by some oversight apparently, but directly contrary to the provisions of the Statute (set out in the tariff in the schedule to the Arbitration Act) awarded himself $5,250, a sum so greatly in excess of what we are informed the statute authorised, viz.: only $175, i.e. for seven days sitting at $25 per day each sitting to consist of not less than six hours as the tariff directs, that if an award is ever to be set aside on such a ground as amounting to misconduct (using the term in its legal sense only) then this is the case where it might be done. In Prebble v. Robinson, [1892] 2 Q. B. 602, 604, it is said by Lord Chief Justice Coleridge that though whether this amounts to misconduct is "an open question" yet "I am far from saying it might not." I note that the tariff does not make any provisions for remuneration for the time occupied in the preparation of the award which may take a good deal of time, especially in such a case as the present wherein the arbitrator has evidently bestowed much care thereupon.

As to the interest allowed, I think that the award cannot stand in that respect also; no authority justifying it has been cited to us.

If the matter rested here I should be in some doubt as to the course to be adopted because as is said in Redman on Arbitrations at 279:—

" . . . It is conceived that no award will now be set aside for any defect which the arbitrator could cure, but that in all cases it will be remitted to him. Many of such mistakes can now be corrected under the slip section. (Arbitration Act, 1889, sec. 7 (c))."

But there is this further element, that, I think, with all due deference, the award is, as contended, bad in law on its face, because so far as I can gather from certain discursive expressions the arbitrator has made it on a wrong assumption of the riparian rights of the owners and without giving due effect to the statement of those rights which was agreed to between the parties and submitted to him in writing. He seems, so far as I have been able to extract his exact meaning to have laid much stress upon the fact that in "common

practice" the owners of property "abutting upon the water" have the "privilege of applying to the Crown for a grant to extend the property affected out to deep water or to an established pier headline and this right or privilege is, I believe, rarely, if ever, withheld where the rights of others are not interfered with." But the whole point on this head is that the "rights of others" would in this case be interfered with because the City of Vancouver is already the owner of the foreshore and bed as grantee from the Crown, and it is inconceivable that in such circumstances the Crown would give land-owners inside their property the privilege mentioned just as though the Crown had not parted with the bed and foreshore. How could the inside owners ever hope to build on the city's bed and foreshore "out to deep water or to an established pier headline," or otherwise without the city's permission, which not only has not been given but the city is here in opposition to their claim. Nevertheless he estimates this "riparian right or advantage, or whatever it may be termed (as) a very important factor in fixing the amounts awarded to the respective owners," but in my opinion if the rights of the city are properly understood and applied the so-called "advantage" is of so little if any practical value that it ought not to have been seriously regarded, nor can the owners derive any assistance in this relation, if in any, from the use of the words "or interests" on which much stress was laid. There are some observations upon this hope or expectation from the Crown by Mr. Justice Cassels in The King v. Bradburn (1913), 14 Ex. 419, at 436-41, which was a case where inland lots had become water lots because of certain river improvements by the Crown but in a non-tidal river and therefore the circumstances are different. Even in that case he says, p. 437: "It may be a question whether a hope of this kind is an element that should be taken into account." But the case at bar is a much stronger one because the bed and foreshore had already been granted by the Crown.

There is at least one other matter in the award that is open to serious objection, viz: the assumption that the owners of lots 5 and 6 could have made the same, or as favourable an agreement with the city as the owner of lots 1, 2 and 3 who got a quit claim deed from the city and therefore should now be treated on the same basis, though in fact they have not got the necessary deeds; but it is unnecessary to consider

it because what has already been noticed is sufficient to warrant the award being set aside.

I express no opinion about the amount of the award because we have nothing to do with that, as it was not attacked on that ground nor is there any evidence before us on the point.

GALLIHER, J.A.:—I would set aside the award without a reference back.

McPHILLIPS, J.A.:—The appeal is one by the city of Vancouver, and the Canadian Northern Pacific Railroad Company from the judgment and order of the Honourable Mr. Justice Morrison who upon an application made to set aside the award complained of, refused the application but remitted the award to the arbitrator for reconsideration and amendment as to the subject of the adjustment of taxes or revenue or both and also as to costs and arbitrator's fees and expenses.

The submission entered into was to a single arbitrator being the claims of a number of owners of land upon False Creek also claiming riparian rights, all the claims were heard together—in fact consolidated for the purpose of the hearing.

The award however of course deals in detail with each separate property, the amount in the whole awarded aggregating something over $900,000.

The arbitrator's duty was to proceed to the determination of the value of the lands, rights or interests at the date of the service of the notice, which was the 12th of September, 1912, the amount to be paid by the Corporation of the City of Vancouver for the lands riparian, littoral or foreshore rights or interests to be determined by arbitration pursuant to the provisions of the "Arbitration Act."

The Corporation of the City of Vancouver was authorized by statute to proceed to expropriate the lands under nd by virtue of the False Creek Reclamation Act (c. 56, 1 Geo. 5, 1911) and the lands in question in this appeal are referred to in paragraph 3 of the Articles of Agreement between the City of Vancouver and The Canadian Northern Pacific Railway Company, as contained in the schedule to the "False Creek Terminals Act" (ch. 76, 3 Geo. V. 1913), being an Act

to ratify a certain agreement between the City of Vancouver and the Canadian Northern Pacific Railway Company and the Canadian Northern Railway Company.

It may be said that the effect of the legislation was to authorize the conveyance from the Crown to the City of Vancouver in fee simple free from all restrictions all that portion, lying east of Westminster Avenue (now Main Street) of the lands covered by waters previously conveyed to the City of Vancouver, with some stated exceptions thereout as set forth in section 2 of the "False Creek Terminals Act," it will be seen, by the recital to the agreement as contained in the schedule to the Act that the City of Vancouver had obtained grants from both the Dominion of Canada and the Province of British Columbia to the bed of False Creek lying east of Westminster Avenue (now Main Street) in the City of Vancouver.

It may be said by way of summarizing the facts that it would not appear that any of the lands extended to low water mark but that in the case of Lots 1, 2 and 3, some additional depth was conveyed by the City from and out of the foreshore but even with respect to these lots it would not extend to low water mark, that is the proprietorship in the lands did not extend beyond high water mark, save as stated in respect to Lots 1, 2 and 3, and even as to these lots, not all of the foreshore, i.e., to low water mark.

Therefore the facts are that the owners of the lands, all of them, have between them and the sea, the City of Vancouver, owning the foreshore, this creates a situation quite unusual and one that calls for serious consideration when the value of the lands is under consideration, if anything is allowed, upon the view that there exists any riparian, littoral or foreshore rights, interests or rights of access to the sea as referred to in section 5 of the "False Creek Reclamation Act."

It would appear that when a question arose as to whether any riparian rights were to be considered by the arbitrator and allowed for that the solicitors for all parties without having the matter referred to a Judge of the Supreme Court by way of a stated case, agreed in the terms set forth in Messrs. Davis & Co.'s letter of the 12th of December, 1913, to Messrs. Tupper & Co.:—

"That the riparian rights of the owners of the various lots in question did not in September, 1912, include any right

to build, dredge or construct any buildings or works as wharves, slips or otherwise below the high water mark.

"We want to be perfectly clear that whatever negotiations there were between the owners on False Creek, east of Main Street bridge looking to joint action for reclamation and improvement of False Creek east of the bridge did not as a matter of law confer upon the owners any further or other rights than those they originally had as owners of the lots abutting on the Creek."

In my opinion upon the face of the award the arbitrator did not proceed rightly in arriving at the values of the lands in considering the riparian rights and not in accordance with the agreement between the solicitors for all parties.

In fact he proceeded by way of absolute departure therefrom and swept away from consideration the fact that the owners of the lands had between them and the sea the City of Vancouver, i.e., the City of Vancouver had obtained grants from the Crown in the right of the Dominion of Canada and of the Province of British Columbia to the bed of False Creek, and would appear to have valued the lands as if all the owners of the lands were possessed of the right to enjoy the foreshore, as if a lease therefor had issued and the owners were entitled to build upon, occupy and use the land covered by water, being lands vested in the City of Vancouver. In the result it means that the course pursued by the arbitrator calls upon the City of Vancouver in the amount awarded, to pay for land or interests therein not the property of these owners, but the property of the Corporation itself and as well for privileges which by the statement of the arbitrator himself the City of Vancouver could prevent the owners from obtaining, as note his language appearing in the award at p. 67:

"For while the city occupied the position of being able to block or prevent these owners from obtaining their foreshore grant or leases it manifestly was not their intention so to do prior to the agreement with the Canadian Northern Railway as the weight of evidence plainly shews; and the right of access to the sea from property so centrally situated is in my opinion valuable and has a potential value beyond the figures awarded herein."

It is plain that the arbitrator has proceeded wrongly and took into consideration and allowed to the owners values

which were not capable of being taken into account and therefore the award is in this respect bad on its face, an arbitrator whilst entitled to value all that which is the property of the owners of the lands and to be expropriated, is not entitled to allow in his award for lands not vested in the owners or for rights or interests which do not attach to the lands and cannot in the immediate or even remote future be acquired as being advantages that attach to the lands.

In my opinion that which was present in Cedar Rapids Mfg. & Power Co. v. LaCoste (1914), 16 D. L. R. (P. C.), is absent in the present case, as the City of Vancouver owns the land covered by water being the bed of False Creek.

Here we have the arbitrator allowing for land not the property of the owners and for possible advantages which it must be seen were impossible.

Lord Dunedin in Cedar Rapids Mfg. & Power Co. v. LaCoste, supra, at p. 174, said:—

"that there was a probability of a purchaser who was looking out for special advantages being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realized scheme."

But in the present case the City of Vancouver was already possessed of the ownership of the foreshore lands and the lands covered by water being the bed of False Creek, that being the situation how is it possible to support an award which has been reached by allowing in the values found for lands not vested in the owners, incapable of becoming vested in them and for advantages which the lands did not possess on the 12th of September, 1912, and impossible of being acquired in the future?

What the arbitrator was entitled to do in arriving at values is succinctly set forth by Lord Dunedin at p. 171 in Cedar Rapids, etc., supra:—

"1. The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taken.

"2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined."

It is plain that bearing in mind these propositions the arbitrator has palpably erred in allowing values which did not attach to the lands and is in this respect bad in point of law and for this reason alone in my opinion must be set aside.

Then we have the further questions of the allowance in the award of taxes, interest and costs. In my opinion the arbitrator was without jurisdiction in allowing taxes or interest and the award is bad as to both these items. What was to be determined was the value of the lands on the 12th of September, 1912.

The award is bad on its face in allowing and apportioning the costs as is therein set forth and offends against the schedule in the Arbitration Act, dealing with the allowance and disposition of costs, and would appear to be upon an excessive basis even if no tariff existed. In passing, I might state that in an arbitration of the magnitude under consideration, it might well have been that there should have been some agreement between the parties, but apparently that was not come to.

Counsel for the respondent with great ability contended that the award even if found to be bad on its face and wrong in law in any respect should be remitted back to the arbitrator, but see In re Arbitration between Montgomery Jones & Co. and Libenthal Co. (1898), 78 L. J. R. 406. It may be said though that this case is an authority for the proposition that even where there has been a mistake in law by the arbitrator that that would not constitute cause for setting aside the award, it is therefore with great hesitancy that I have come to the conclusion that in the present case the award should be set aside. I feel constrained however to do so upon the ground that the arbitrator exceeded his jurisdiction in the award made, allowing for properties, rights, interests and advantages that were non-existent, it not being the case of possible inflated values, a matter with which I am not called upon to pass, nor merely a mistake in law, that is not error confined only to a wrong decision on fact of law, but awarding values unsupportable by any facts and as well erring in law. Whilst it is not misconduct in the sense of any wrong intent, it is misconduct for an arbitrator to proceed in excess of the jurisdiction with which he is clothed and transcend the powers conferred by the statute in pursuance of which only

he is entitled to proceed and arrive at his award, it is misconduct in a legal sense, although devoid of all moral culpability (Re Hall and Hinds (1841), 2 M. & G. 847). In all proper cases the advice of counsel should be taken and the present case is one in which the arbitrator would have been well to have been so advised (Hare, in re (1839), 6 Bing. (N. C.), 158; Goodman v. Sayers (1820), 2 J. & W. 249; Rolland v. Cassidy (1888), 57 L. J. P. C. 99 at p. 102). It is preferable though that this course should only be followed with the knowledge and consent of the parties, but this is not obligatory.

Upon the whole I am of the opinion that the award should be set aside. It therefore follows that in my opinion the appeal should be allowed.

Appeal allowed; MACDONALD, C.J.A., *dissenting.*

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BLANC.

REX v. SCHURMAN.

Criminal Law—Charge to Jury—Attempted Rape—Misdirection—Duty of Jury to Acquit Where Impossible to Ascertain Truth—Burden of Proof—Presumption of Innocence—Shifting of Presumption.

The Judge should make it clear to the jury in a trial for attempted rape that it is their duty to acquit in the event of the jury being unable to satisfy themselves as to who is telling the truth, and it was therefore *held* to be a misdirection where the Judge's charge to the jury gave them the impression that they must believe either the story of the prosecutrix or the accused.

The presumption of the innocence of an accused person cannot be shifted at a point where the evidence tends or inclines in the direction of guilt, and, therefore, it was *held* to be a misdirection where the Judge said to the jury: "As soon as there is sufficient evidence before you which would tend to point to the guilt of the accused, then the presumption is on the other side."

Regina v. *White et al.* (1865), 4 F. & F. 384; *Rex* v. *Krofchenko*, 22 Can. C. C. 296: applied.

The appeal was heard by NEWLANDS, LAMONT, BROWN, and ELWOOD, JJ.

J. A. Allan, K.C., for accused.

T. A. Colclough, K.C., Deputy Attorney-General, for Crown.

The judgment of the Court was delivered by

BROWN, J.:—The accused was tried with a jury and convicted on the charge of attempted rape. At the conclusion of the charge to the jury by the learned trial Judge, Mr. Allan, K.C., counsel for the accused, made the following request:

"I would ask your Lordship to direct the recall of the jury and to direct them that a verdict of acquittal does not necessarily mean a verdict of finding that the prosecutrix is a woman of loose character, that it simply means that they are not convinced that her story is the correct one with such conviction as will enable them to bring in a verdict of 'guilty.' The principle of reasonable doubt may well be applied where stories are contradictory and they cannot bring their minds to a decision as to which story is to be accepted and that in such cases the doubt must be given to the prisoner."

The trial Judge refused to recall the jury and refused to grant a reserved case. The accused now applies to this Court for leave to appeal, and on the argument before us counsel for the Crown agreed that we should deal with the matter as if a case had been stated.

The following portions of the Judge's charge are, in my opinion, the only ones material to the consideration of the question:

"However this case, like so many unfortunate cases of a similar nature, involves the question of which of two witnesses to believe. You have the two contradictory stories, one told by Mrs. Sholts, the other by the accused, Schurman. You are the sole judges of the facts. You have heard the evidence of both parties, and it is for you to say which of the stories is to be believed. You are not bound by any expression of opinion I may make on the facts. It is for you to say which witness you are to believe. I must say that it makes it very difficult for you, because there is so little to help you to come to a conclusion. But you must form a con-

clusion from the evidence. It is for you to say which of these two parties is telling the truth. If you believe that the story of the woman is the correct one, then you must find that the accused is guilty of an attempt to comit the offence charged. If on the other hand you believe that the story of the man is correct, then you must find that the woman is a woman of loose character, and, more than that, she is guilty of telling deliberate lies in the witness-box. I need not say much in regard to the presumption of the prisoner's innocence. Mr. Allan has gone into that fully. The prisoner is presumed to be innocent until he is proved to be guilty. That is quite true, but on the other hand, as soon as there is sufficient evidence before you which would tend to point to the guilt of the accused, then the presumption is on the other side, because if you believe one story he is guilty, and if you do not believe that story then he is innocent. Then there is the point Mr. Allan mentioned about reasonable doubt. There does not seem to be much room for doubt in this case. There cannot be even reasonable doubt if you believe either one of these stories. If you believe the story of the woman there is no doubt of the guilt of the accused, and if you believe his story then there is no room for doubt of his innocence."

Unfortunately we do not know what Mr. Allan's remarks to the jury were on the question of presumption and reasonable doubt, but we can scarcely assume that they were sufficient to offset any wrong impression that the Judge's charge may have made on the minds of the jury. I am of opinion that the Judge's charge is objectionable for two reasons: Firstly, it tended to give the jury the impression that they must believe the story either of the prosecutrix or of the accused and that it was their duty to decide which one of the two was telling the truth. The possibility of neither party stating the whole truth was not, in my judgment, sufficiently put before the jury. As a matter of fact, in cases of this character, according to experience, it very often happens that both parties considerably colour the truth. Then, in the event of the jury being unable to satisfy themselves as to who was telling the truth, it should have been made clear to them that their duty was to acquit. Secondly, I am of opinion that the Judge erred in stating: "As soon as there is evidence before you which would tend to point to the guilt

of the accused, then the presumption is on the other side." An accused person is presumed to be innocent until he is proven guilty beyond a reasonable doubt, and the presumption of innocence, therefore, cannot be shifted at the point where the evidence tends or inclines in the direction of guilt. In Regina v. White et al, 4 F. & F. at p. 384, Martin, B. is reported to have instructed the jury:—

"that, in order to enable them to return a verdict against the prisoner, they must be satisfied, beyond any reasonable doubt, of his guilt; and this as a conviction created in their minds, not merely as a matter of probability; and if it was only an impression of probability, their duty was to acquit."

This case, though decided in 1865, has always been regarded as laying down the rule correctly. In Russell on Crimes, at p. 2058, the following statement appears:

"A person accused of a crime is presumed to be innocent until the presumption is rebutted by legal evidence, whether direct or circumstantial, excluding all reasonable doubt of his guilt."

Taylor on Evidence, 10th edition, at p. 113, lays down the rule as follows:

"One of the most important of disputable legal presumptions is that of innocence. This, in legal phraseology, 'gives the benefit of a doubt to the accused,' and is so cogent, that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty. In civil disputes, when no violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burden of proof, may constitute sufficient ground for a verdict. To affix on any person the stigma of crime requires, however, a higher degree of assurance; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt."

I think Mathers C. J., in the case of Rex v. Krafchenko, 22 Can. C. C., at p. 296, has very correctly stated the rule where he says:

"I have told you that you should not convict if you have a reasonable doubt of the prisoner's guilt. By the term reasonable doubt I do not mean a possible doubt, but an actual and substantial doubt. A juror may not create materials of doubt

by resorting to trivial suppositions and remote conjectures as to a possible state of facts different from that established by the evidence. If, after a fair and impartial consideration of all the evidence in the case both for the Crown and for the defence, you have an abiding conviction of the guilt of the defendant and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond reasonable doubt; but if the evidence has left you in that condition of mind that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge then you have a reasonable doubt."

In my view, the charge of the learned trial Judge may have misled the jury, and therefore the conviction should be quashed and a new trial ordered.

Conviction quashed; new trial ordered.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

REX v. HOWES.

Criminal Law—Evidence—Secret Commission Act, 1909 — Conductor of Railway Company Accepting Money for Spotting Cars for Use of Farmers, Under Grain Act — Payments Made to Accused by Farmers Not Named in Charge—Evidence of, Admissible to Rebut Defence of Innocent Motive or Want of Design.

The accused, who was a conductor in the employ of the Canadian Northern Railway Co. and whose duty it was to spot cars for the use of farmers under the provisions of the Grain Act, was convicted under the Secret Commissions Act, 1909, for having accepted certain sums of money from farmers for spotting cars at a way station on the said railway where there was no agent.

Held, that evidence of other farmers, whose names were not mentioned in the charge, that they had paid the accused for spotting cars, although not admissible to prove the main facts of the case, was admissible to rebut by anticipation the defence of innocent motive and want of design, and to shew the state of mind of the parties with regard to the facts proved.

Case reserved by the trial Judge for the opinion of the Supreme Court en Banc.

The Court consisted of HAULTAIN, C.J., LAMONT, BROWN and ELWOOD, JJ.

P. E. Mackenzie, K.C., for the Crown.

No one for accused.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—The case reserved by the learned trial Judge for the opinion of this Court is as follows:—

"The accused was a conductor in the employ of the Canadian Northern Railway Company, and he was charged under the Secret Commission Act, 1909, for having taken certain sums of money for spotting cars at a way station on the Canadian Northern Railway Company's line of railway where there was no agent. It was a part of his duty to spot these cars, and there was no provision, nor had he any right to get compensation from the farmers who required cars for spotting them. These cars were being placed at the station for farmers under the provisions of the Grain Act.

"On the first trial of the accused, he having been tried twice, and the jury having disagreed on the first trial, Mr. Mackenzie, K.C., the Crown prosecutor, asked me to admit evidence of farmers other than the complainant who had also paid to the accused sums of money for spotting cars for them. As I was under the impression that evidence of this kind would be similar to evidence of other thefts in a case of theft, and would go more to prove the general bad character of the accused than to prove him guilty of the offence, I refused to admit the evidence. On the second trial, however, I came to the conclusion that the offence with which he was charged was that of taking money for spotting cars at this station, which spotting was part of his duty under the terms of his engagement, and for which he was not entitled to charge the farmers for whom he spotted the cars any consideration; and that the fact that the charge specified one particular instance of the paying of money to a particular farmer would not of itself shut out the evidence of other farmers paying the accused for doing the same work. I therefore on the second

trial admitted the evidence of a large number of farmers, whose names were not mentioned in the charge, who had paid various sums of money to Howes in order to get him to spot cars for them at the same station. The jury in the second case brought in a verdict of 'guilty;' and I bound the accused over to appear for sentence, and decided to submit a case for the opinion of the Court as to whether I was correct in admitting this evidence at the second trial.

"The question to be submitted for the opinion of the Court is: 'Was the evidence of these other farmers, whose names were not mentioned in the charge, that they had paid the accused for spoting cars, proper evidence to be admitted under the charge in this case?'"

As no one appeared on behalf of the accused, we are doubly indebted to Mr. Mackenzie for his very comprehensive and impartial presentation of the cases bearing on the point reserved for our decision.

The facts of the case are not in dispute, and no evidence for the defence was offered on the trial.

The accused was a conductor in the employ of the Canadian Northern Railway Company. As a part of his duty he was required to take and place cars at a station called Birdview for the use of farmers, under the provisions of the Grain Act. It was not part of his duty, and he was not authorized, to allocate any particular car to the use of any particular farmer. A farmer called Buchanan, being anxious to obtain a car for loading his grain at Birdview, had some negotiations with the accused, in the course of which the accused undertook to secure him a car if he would pay him $5. This arrangement was carried out on several occasions, on each of which the payment of $5 was made.

Although there was no evidence put in for the defence, the cross-examination of the witnesses for the Crown clearly developed an attempt on the part of the defence to shew that these payments made to the accused were not made as an agreed consideration for services rendered, but were simply gratuities or tips made to the accused after the event by a grateful farmer. Evidence was then offered by the Crown of other cases where the accused was paid money by farmers for securing cars for them. This evidence was objected to, and

the question now submitted for our consideration is whether this evidence was properly admitted.

In the case of Makin v. Attorney-General for New South Wales, [1894] A. C. 57, at p. 65, Lord Herschell, in delivering the judgment of the Judicial Committee of the Privy Council, stated the principles upon which evidence to shew intent is admitted as follows:—

"In their Lordships' opinion, the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

In the case before us, the doing of the act, that is, the taking of the money, and the connection of the parties with that act, were sufficiently proved by Buchanan. The evidence objected to was not offered and would not have been admissible to prove the main facts of the case. It was clearly put in to rebut by anticipation the defence of innocent motive and want of design, and to shew the state of mind of the parties with regard to the facts proved. The evidence given proves other acts of the same kind as that in question and proximate in point of time. It clearly shews that payments of a similar character were exacted by the accused in several other cases as a condition upon which cars would be furnished, and completely rebuts the defences suggested by cross-examination.

In my opinion, therefore, the evidence was admissible, and the question submitted to us should be answered in the affirmative.

Conviction affirmed.

THE

Western Law Reporter

VOL. XXX. TORONTO, DEC. 28, 1914. No. 2

BRITISH COLUMBIA.

NOVEMBER 9TH, 1914.

COURT OF APPEAL.

REX v. SHAJOO RAM.

Evidence—Oath to Chinaman—Mode of Administering.

Held, that an oath administered to a witness, without objection, in the form ordinarily administered to persons of his race or belief, is binding and the witness cannot afterwards be heard to say he was not sworn.

Rex v. *Lai Ping*, 11 B. C. R. 102, followed.

Held, that it was not necessary to ask the said witness whether the oath in the form in which he took it was recognized by him as binding upon his conscience, there being no such word as 'conscience' in the language of the witness, but that it was only necessary in such a case to use such equivalent terms as would bring home to the witness the fact that he was binding himself according to his moral sense to speak the truth.

Curry v. *The King* (1913), 48 S. C. R. 532, followed.

Per IRVING, J.A. (dissenting):—An oath is improperly administered where there is no invocation to a Deity.

Stated case.

The Court consisted of IRVING, MARTIN, GALLIHER, and MCPHILLIPS, JJ.A.

IRVING, J.A. (dissenting):—In this case I have reached the conclusion that there was no proper oath administered. There is no indication whatever of a Deity being invoked. That invocation is essential to constitute an oath. Therefore the case, in my opinion, should be answered in favour of the prisoner.

It seems to me that this case shews a very loose and unsatisfactory way of doing business is permitted in the Police

Court. It may take a little more time to do things properly and in order, but it is necessary that they should be done properly in order to be legal.

MARTIN, J.A.:—In my opinion the learned Judge of Assize was right in deciding on the evidence that a proper oath was administered in the Police Court. It is conceded that the witness was competent to take an oath. I pause here to say that there is no doubt that the words "You take your oath" were used, as will be seen by reference to the evidence, in which Ricketts, the interpreter, says what he told him was, "The oath that you take," so this clears up the doubt that was expressed by counsel for the prisoner as to whether the language really used was not "You eat your oath," suggesting that it was used advisedly in accordance with some peculiar form of religious observance: it is clearly only an error of the stenographer.

I think in principle that this case is governed by the unanimous decision of the full Court in Rex v. Lai Ping, 11 B. C. R. 102, wherein all the four Judges agreed (including Mr. Justice Duff, now of the Supreme Court of Canada, my brother Irving, and myself) that an oath administered to a non-Christian Chinaman was properly administered, though all he did after stating that he swore by burning paper after writing his name on it, was to write his name on a piece of paper and burn the same while being told "that he was to tell the truth, the whole truth, and nothing but the truth, or his soul would burn up as the paper had been burned." There was in this, be it noted, no invocation of a deity or supreme power or statement that the witness's conscience was bound, yet the decision of the Court given at p. 106, in the language of the Chief Justice, with whom all agreed, is as follows:—

"It seems to me that when a man without objection takes the oath in the form ordinarily administered to persons of his race or belief, as the case may be, he is then under a legal obligation to speak the truth, and cannot be heard to say that he was not sworn. If we were to decide otherwise we would deprive the evidence given in a Court of Justice of the most powerful and necessary sanction which it is possible to give it, namely, the risk of a prosecution for perjury."

In the case at bar the prisoner said, through the interpreter: "I take my oath to tell the truth and nothing but the truth," and also held up his hand at the time of so doing.

It was not disputed that this is the "form of oath ordinarily administered to persons of his race or belief" and that fact further appears by the case before us containing part of the evidence on the trial in the Assize Court whereby it is shewn that the accused, and present appellant, himself was again sworn in the same way according to the "custom of his people" by putting up his hand and "affirming," as the interpreter loosely terms it, though he, of course, does not use that word in its real technical sense, as appears by his next remark: "He swears by putting his hand up. It is like affirming;" and he says this is "the usual oath;" also in answer to the learned Judge the interpreter stated that he had put the oath to the witness in such a way that it "would compel him to tell the truth." I attach no importance to the fact that the witness was not explicitly asked "if the oath in the form in which he took it was recognised by him as binding upon his conscience" because it is clear from the recent decision of the Supreme Court of Canada in Curry v. The King (1913), 48 S. C. 532, that it is not necessary so to do; I refer particularly to the judgment of Mr. Justice Anglin, at p. 540. And in the case at bar such a question in those exact words could not have been asked or answered because we are told by the two interpreters that there is no such word as "conscience" in the witness's language.

Gwyther says:—

"The word 'conscience' well, I have never used it yet on a trial and as far as I know, no one else knows how to put it to them. It is to be binding on them. It is to be binding on their conscience. It is one and the same thing. It is simply a translation of the one thing into the other."

In such circumstances all that it was possible to do would be to use such appropriate and equivalent terms as would bring home to the mind of the witness the fact that he was binding himself according to his moral sense to speak the truth. There are many words in many languages which cannot be directly or exactly expressed by those in other languages, but the law does not allow justice to be defeated by requiring the performance of formal or technical linguistic impossibilities. Here the interpreter Ricketts says: "I asked him the best way I could if that was binding upon his conscience," and again "I put it to him the strongest way I could," and as he speaks the language well what more could be expected? He said to the witness: "The oath that you

take is this binding on you?" and the witness replied that it was. Surely that can mean one thing and one thing only, that it was clearly brought home to the witness that he was bound by his moral sense, i.e., his conscience (though that word could not be exactly employed) to tell the truth, and if he did not it would be wilful and corrupt falsehood. Accompanied as this statement was by the uplifting of the hand toward the heavens, a solemn and significant act inseparable in such circumstances from an intention to invoke a deity supposedly therein dwelling, and one for a great length of time associated with "the more ancient of the two forms known in modern proceedings, 'the adjuratory invocation of the Deity with uplifted hand commonly called the Scotch oath'" as the Chief Justice of Canada puts it in Curry v. The King, supra, I have no doubt whatever that the conscience as we call it, of the witness was duly bound. As the Chief Justice went on to say:—

"Having taken the oath in that form without objection it is an admission that the witness regarded it as binding on his conscience."

It must be conceded that he was duly sworn according to the "form ordinarily administered to persons of his race or belief," because the evidence to that effect is uncontradicted, and therefore he could be convicted of perjury on this very oath which is here attacked if he were being tried in his own country, India, and yet it is said that he can escape that punishment on the same oath in this country. I confess I am unable to follow such reasoning. It is directly contrary to the decision in Rex v. Lai Ping, which we are bound by and which has been followed for ten years and never questioned. The suggestion that valid oath of a witness somehow loses its efficiency to bind him because he happens to change his residence to some other part of the Empire places so great a premium on perjury that I feel it should receive no encouragement from this Court. In the judgment of Mr. Justice Idington in Rex v. Curry there is a paragraph, the last, which contains expressions peculiarly appropriate to this case:—

"It is extremely desirable that men appearing as witnesses in our Courts and in such capacity taking any form of oath or making any affirmation, should understand they are, when wilfully and corruptly speaking falsely under any such circumstances, liable to be convicted of perjury, whatever may

be their peculiar religious, mental, or moral conceptions of the binding effect of the form of oath or affirmation."

With regard to the precautions taken by the magistrate, it appears to me that he took unusual care to satisfy himself by putting questions through the interpreter, in the way pointed out, to see that the oath he administered himself was properly put and that the conscience of the witness had as a matter of fact been bound; and two interpreters were used, viz., Ricketts and a check interpreter, Gwyther, who is a Government interpreter of Hindu languages in the Canadian Immigration Department.

GALLIHER, J.A.:—While I take the view that on the whole, greater care should have been taken in this case in the administration of the oath, I am inclined to think that the oath was sufficiently administered.

MCPHILLIPS, J.A.:—I agree with my brother Martin. I merely wish to add, in dealing with people who do not speak the English language, no matter what language it may be, there will always be difficulty perhaps in rightly conveying, in apt words of that foreign language, the true meaning of what is a first essential in a British Court of Justice, and that is, that all evidence should be preceded by an oath or failing an oath, an affirmation, which is provided by Statute.

Now, in this particular case upon the evidence I consider the stated case furnished to us shews that sufficient care was taken to properly convey and have portrayed to the mind of the witness what he was bound to do, and that was to take an oath under the law as we have it. I am the more impelled to come to this conclusion when I find that this witness when giving his evidence in the Assize Court also was sworn in the same manner, and, apparently was thought to have been sufficiently sworn there. It would seem to me that if we were to come to the conclusion that he was insufficiently sworn in the Police Court we would have to conclude that likewise he was sufficiently sworn in the Supreme Court. I think that that would hit very seriously at the administration of criminal justice, that there should be any requirement of a more strict nature than, apparently, followed out in the Supreme Court, and I think as well followed out in the Police Court. The whole question would be then, Did this witness come into the Court with the intention to take an

oath which was binding upon him? And we have the natural response that would go with that, as it appears when he wished his evidence to be believed for the purpose of his exculpation, in the Supreme Court, he was sworn in like manner.

My conclusion, therefore, is, that the question should be answered in favour of the Crown.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

VICARS v. ARNOLD ET AL.

Innkeeper—Loss of Guest's Goods—Duty of Innkeeper to Furnish Key for Room—Evidence—Burden of Proving Negligence of Guest.

Held, that an innkeeper is liable at common law for the loss of a guest's chattels which are stolen from the latter's room, in the absence of negligence on the part of the said guest, where the innkeeper does not furnish a key and the means of securing the room against any person entering it.

Held, that the onus of proving negligence on the part of the guest rests upon the innkeeper.

Held, that the guest is under no duty to enquire for a key.

Burgess v. Clements, 4 M. & S., 306, applied.

Appeal from the judgment of a District Court Judge in favour of the defendants, hotelkeepers, in an action for damages for the loss of goods which had been stolen from the plaintiff's room while a guest of defendants.

The appeal was heard by NEWLANDS, BROWN, and ELWOOD, JJ.

T. J. Blain and W. A. Adams, for plaintiff, appellant.

P. M. Anderson, for defendants, respondents.

The judgment of the Court was delivered by

ELWOOD, J.:—In this matter the facts are briefly as follows:

In the month of January, 1913, the plaintiff and three others went to the hotel in the city of Regina kept by the defendants, and requested accommodation as guests of the

hotel. They were given accommodation, and all shewn into one bedroom. The plaintiff asked the bell-boy who shewed him to the room for a key, and was told by him that there was no key for that room. The plaintiff remained at the hotel several days, and while there on one occasion left his overcoat in the bedroom that he and the three others were occupying, went down to the dining-room to have his meal, and on his return found that his overcoat had been taken. He complained at the office, but the overcoat has never since been found. The District Court Judge before whom the action was tried held that there was not sufficient evidence to shew that the defendants were innkeepers; and that there was contributory negligence on the part of the plaintiff in not applying to the office for a key to the room; and that, the room having been left unlocked, the loss of the coat was occasioned by the negligence of the plaintiff.

So far as the question of whether or not the hotel in question was an inn is concerned, it was conceded on the argument that the evidence did disclose that the hotel in question was an inn and was an hotel licensed to sell liquor under the provincial Liquor License Act. The evidence is indefinite as to whether or not the plaintiff left the door of his room closed when he went to the dining room, but the onus was on the defendant to shew negligence on the part of the plaintiff, and the weight of evidence was in favour of the contention that the door was closed; in fact there was no evidence to shew that it was open. The only evidence on that point was the evidence of the plaintiff, and that evidence is as follows:—

"Q. Did you shut the door? A. I pulled it to.

Q. You won't swear the door was shut? It is just possible you left it open? A. I won't swear positively.

Q. You don't know whether it was open or shut? A. No."

In Cashill v. Wright, 6 E. & B., at p. 899, the law is laid down as follows:—

"We think that the rule of law resulting from all the authorities is that, in a case like the present, the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable as for breach of duty unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man

may be reasonably expected to have taken under the circumstances."

In Armistead v. Wilde, 17 A. & E. p. 264, Patteson, J., says:—

"I take the law to be clear that the innkeeper is prima facie liable for the loss of goods, in his house, though they are left in the commercial room."

In Medawar v. Grand Hotel Company, [1891] 2 Q. B., at p. 21, I find the following:—

"At any rate the plaintiff was a guest in the hotel up to the time when his luggage was put out of the bedroom into the corridor by the defendants' servants. Then the defendants were bound to keep the plaintiff's things safely; and this is conclusive of the defendants' liability for the loss, unless they can shew that the negligence of the owner conduced to the loss. The defendants must shew two things: (1) that the plaintiff was guilty of negligence; and (2) that his negligence conduced to the loss."

A number of cases were cited in support of the proposition that where the plaintiff neglected to lock his room the hotelkeeper was excused, but in each of those cases the evidence shews that the means of locking the room had been furnished to the guest by the hotel. This was the case in Calye's case, Smith's Leading Cases, vol. 1, 115; and in Burgess v. Clements, 4 M. & S. 306; and in Oppenheim v. White Lion Hotel Company, L. R. 6 C. P. 515. But those cases by no means held that in every instance even the giving of a key by the hotelkeeper and the neglect of the guest to make use of the key will relieve the hotelkeeper from his common law liability. In the case at bar, however, it seems to me that there was no negligence on the part of the guest. He, in my opinion, inquired of the person who was appointed by the hotel to shew him to the room for a key, and that person told him that there was no key for the room. Surely the guest was justified in assuming that the bell-boy would know whether or not there was a key for the room, and that when he told him there was no key, that there was in fact none. In fact the evidence shews that there was no key for the room, but that if an inquiry had been made for a key the hotelkeeper could have or would have gotten one. I am of the opinion that there was no duty cast upon the guest to inquire for a key, but that if the hotelkeeper wishes to escape from his common law liability he must himself furnish the

guest with a key and with the means of securing the room against any person coming into it. This seems to my mind pretty well established in Burgess v. Clements (ante), at p. 310, where I find the following:—

"And I agree that if an innkeeper gives the key of the chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper. But if there be evidence that the guest accepted the key and took on himself the care of his goods, surely it is for the jury to determine whether this evidence of his receiving the key proves that he did it animo custodiendi and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord forced it on him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room."

The uncontradicted evidence is that the coat in question was worth $125; and in my opinion the appeal should be allowed and judgment entered for the plaintiff for $125 and the costs of the action and of this appeal.

Appeal allowed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

BAXTER v. ELLIOTT.

Costs—Scale—Dismissal of Counter-claim—Small Debt Tariff—District Court Tariff—District Court Rule 18.

Held, that, under Rule 18 of the District Court Rules providing that if in an action in the District Court the plaintiff recovers $100 or less 'he shall recover only such costs as he would have recovered had the action been brought under the provisions of the small debt procedure,' a plaintiff is entitled to tax his costs of defence to a counter-claim on the District Court scale where the said counter-claim of over $100 was dismissed with costs.

Amon v. *Bobbett*, 22 Q. B. D. 543, applied.

An appeal from the judgment of a District Court Judge on a question of costs.

The appeal was heard by NEWLANDS, BROWN and ELWOOD, JJ.

T. P. Morton, for the plaintiff, appellant.

C. W. Hoffman, for the defendant, respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—The plaintiff brought action against the defendant on a promissory note for $50 and interest, an account for work done and materials provided, and for goods sold and delivered amounting to $81.05, or together, including interest on note, $5.25, for the sum of $136.30. The defendant admitted the note but denied owing the rest of the claim, and he counter-claimed for work done, goods sold and delivered, board and lodging furnished the plaintiff's wife and daughter, and care and feed of the plaintiff's horse, making together $176.35, or after deducting the amount admitted, the sum of $121.10.

At the trial judgment was entered for the plaintiff for $55.25 and costs, and the counter-claim dismissed with costs.

Under rule 18 of the District Court Rules, plaintiff taxed his costs of action under the small debt tariff, and his costs on dismissal of the counter-claim were taxed under the same tariff. An appeal was taken from the taxing officer to the District Court Judge, who, on a review of the taxation, decided that the plaintiff could only tax his costs on dismissal of the counter-claim under the small debt tariff, which would be 10 per cent. of the amount of the counter-claim. From this decision the plaintiff appeals.

The question under what scale the plaintiff can tax his costs of defence to the counter-claim depends upon the construction to be placed upon rule 18 of the District Court Rules. This rule is that if in an action in the District Court the plaintiff recovers $100 or less "he shall recover only such costs as he would have recovered had the action been brought under the provisions of the small debt procedure." The English rule marginal No. 967, says that if the plaintiff recovers a sum not exceeding $50 "he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court."

These rules being practically the same, the decision of the Court of Appeal in England in Amon v. Bobbett, 22 Q. B. D. 543, will apply. The following citation from the judgment of Bowen, L.J., gives the facts of that case and the rea-

sons for the decision of the Court that the plaintiff's costs of his successful defence of the counter-claim should be taxed on the High Court scale. On page 546 he says:—

"The facts are simple. There was a claim for £48, which might have gone to the County Court, but was brought in the Superior Court; the defendant had a counter-claim (a real counter-claim, not a set-off) in the nature of a cross-action for over £100, which, as a separate action, he could only have properly brought in the Superior Court. The plaintiff succeeded on his claim, in fact it was not disputed; the counter-claim failed; therefore the plaintiff succeeded both on the original claim, and the counter-claim. Then arose the question of costs. The plaintiff admits that, having recovered only £48 on his claim, he is touched by Order LXV., r. 12, and as regards his claim can only get costs on the County Court scale. But the defendant seeks to go further, and says that as the plaintiff was suing in the High Court for a sum which could have been recovered in the County Court, he is only entitled to costs on the counter-claim on the County Court scale, although that counter-claim was for a sum exceeding £100.

"We have a simple question to decide; whether a plaintiff, who recovers less than £50 on his claim, and admits that in respect of it he is not entitled to costs on the High Court scale, and who also succeeds on a counter-claim, is to be limited as regards the counter-claim to County Court costs. This question depends entirely on Order LXV., r. 12, upon which there are two opposite contentions. The plaintiff admits that the rule applies, but says that the counter-claim is not part of his action, and that the rule only cuts down the costs of his action. The defendant says that the counter-claim is part of the litigation, and that the costs of the whole litigation are cut down by the rule when the plaintiff might have commenced proceedings in the County Court. Which is the true construction? It is true that in many of the rules the counter-claim is spoken of as though it were part of the procedure in the plaintiff's action; but it has been held in many cases that for the purposes of taxation a counter-claim should be treated as though it were a cross-action. It is obvious that the view which is to be taken of a counter-claim must depend upon the particular rule in which it is dealt with; and if we find that the mixing up of the claim and counter-claim together (as to speak) would work injustice,

then we must adopt the other view, and disconnect the counter-claim from the claim, so far as may be necessary for the purposes of justice. Here the plaintiff has, it is true, chosen the forum; but a plaintiff who has proved successful on a counter-claim can hardly suppose when he brings his action that a shadowy counter-claim is about to be waged against him; he is not responsible for its being set-up. As to the costs then which belong to the choice of forum (if I may so phrase it), the plaintiff can only get County Court costs; but why should he only get County Court costs on an issue for which he is not responsible, an issue which could not have been brought in the County Court, and upon which he has proved successful? Why should his right to costs be so limited? To cut down the plaintiff's right to costs in this fashion would be to work injustice; and moreover the rule does not require that interpretation; it uses the word "entitled"; entitled where? It can only mean entitled "in his action," and the language of the remainder of the rule shews that these words should be read in in this place; the rule really deals with the costs appurtenant or appendant, so to speak, to the plaintiff's own action."

If the facts in this case are the same, the rules being practically the same, the reasoning of Bowen, L.J., will apply and the plaintiff would be entitled to tax his costs of defence to the counter-claim on the District Court scale and not on the small debt scale.

In only one particular do the cases differ, and that is in the nature of the counter-claim. Both the learned Judges who delivered judgments in Amon v. Bobbett, Lord Esher, M.R., and Bowen, L.J., emphasized the fact that it was a real counter-claim and not a mere set-off. In this case the counter-claim, being for a debt or liquidated amount, is properly a set-off or defence to the plaintiff's action and not a counter-claim, if it were not for the fact that it exceeds the amount of the plaintiff's claim and the defendant asks for judgment for the excess. After admitting a part of the plaintiff's claim the defendant claims $121.10 in excess. This amount could only be recovered under the general procedure of the District Court. I am of the opinion, therefore, that this case is similar to Amon v. Bobbett, and the reasoning of the learned Judges in that case applies.

The case of Cox v. Christie, 5 T. L. R. 475, cited by the defendant has no application to this case. That action was

brought under the small debt procedure, and the only question there was whether the plaintiff having succeeded on the counter-claim, could tax costs of the counter-claim as well as his costs of action. Rule 617 of the Rules of the Supreme Court, which was then in force and which was similar to District Court Rule 18, was not in question.

I think, therefore, the appeal should be allowed. The bill of costs which the plaintiff claims will have to be referred to the clerk for taxation, as plaintiff has charged a large number of items which are not properly costs of the counter-claim, but costs of the action, and he has put in a number of items for which there is no provision in the tariff.

The plaintiff should have the costs of the appeal.

Appeal allowed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

WOODSIDE v. GRANT AND KEATLEY.

Partnership—Notice of Dissolution—Partnership Act, sec. 38.

Held, that the notice of the change of the constitution of a partnership required by sec. 38 of the Partnership Act enacting that where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change, must be given *after* the dissolution and, that, therefore, a conversation prior to the dissolution of something that might occur in the future has no effect.

An appeal from the judgment at trial in favour of plaintiff in an action for goods sold and delivered to defendants, carrying on business as "The Corona Cafe."

The appeal was heard by HAULTAIN, C.J., NEWLANDS, BROWN, and ELWOOD, JJ.

T. Lynd, for defendants, appellants.

T. P. Morton, for plaintiff, respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an action for goods sold and delivered to the defendants, carrying on business as The Corona Cafe. Judgment was entered by default against the defendant Grant, and the defendant Keatley entered a defence on his own behalf denying that he was a partner of Grant and also denying that the goods were ever sold or delivered to him. The learned trial Judge gave judgment for the plaintiff.

The defendant Keatley appeals against the judgment on two grounds: (1) That there was no evidence of the delivery of the goods; and (2) That before the sale and delivery of the goods the partnership existing between himself and Grant had been dissolved and notice of the dissolution given to the plaintiff.

As to the first ground of appeal, the defendants are sued as partners carrying on business as the Corona Cafe. The defendant Keatley says in his statement of defence that the goods in question were never delivered to him. He does not, however, deny that they were ever delivered to Grant & Keatley or to the Corona Cafe, which is the allegation in the statement of claim. This denial is, therefore, no denial of the statement of claim, as the plaintiff never alleged that he had delivered them to Keatley, but to Grant & Keatley carrying on business as the Corona Cafe. There being no denial of the delivery as alleged, it must be taken as admitted. Apart from this, there is evidence of delivery. Monthly accounts were rendered for these goods and no exception taken to them, and the defendant Keatley offered to pay to the plaintiff $500 in settlement of this claim, but the plaintiff refused to accept any amount less than the total of $688.57.

As to the second ground of appeal, the only evidence of notice is that the defendant Grant, about the end of November or first of December, 1912, when the partnership was existing, on the occasion of some goods having been delivered to the partnership by the plaintiff, told the plaintiff that there were arrangements pending that either Keatley or Grant would take over the business at the end of the year and whichever took over the business would take over the goods. The alleged dissolution took place on the 1st January following. These goods were afterwards paid for by a cheque signed "Corona Cafe, per George Grant." As this was the usual way in which cheques were signed by the partnership

during its existence, it is of itself no notice. The only question, therefore, is whether this conversation prior to the dissolution is a notice such as is required by section 38 of the Partnership Act. That section is as follows:

"38. Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change."

This section requires a notice to be given after the dissolution, as there is no change in the membership of the firm until that occurrence: therefore a conversation prior to the dissolution of something that may occur in the future can have no effect; and as it was proved that the plaintiff knew that Keatley was a member of the firm and had no notice or knowledge that he had ceased to be a member, he had the right, under the above-mentioned section, to treat him as a partner, and Keatley is therefore liable for this account.

The document put in as dissolving the partnership is not properly a dissolution; but there is no necessity to consider its effect, as the plaintiff was not given the notice required by the Partnership Act.

The appeal should therefore be dismissed with costs.

Appeal dismissed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

BAKER v. McCURDY.

Landlord and Tenant—Monthly Tenancy—Notice of Quitting.

Held, that a notice of quitting given on the 23rd of October for the 15th of November by a monthly tenant whose rent was payable in advance on the first day of each month was bad since it did not expire on and with the last day of the period of the tenancy.

Doe d. Spicer v. *Lea* (1809), 11 East. 312, referred to.

Held, that the said notice was not effective for the 30th of November since the giving of notice for the 15th of November and the payment of rent up to that date shewed an unequivocal intention on the part of the tenant to put an end to his tenancy on that date.

Appeal from the judgment of a District Court Judge in favour of the defendant in an action to recover two months' rent for certain property leased by the plaintiff to the defendant.

The appeal was heard by HAULTAIN, C.J., BROWN and ELWOOD, JJ.

R. W. Hugg, for plaintiff, appellant.

A. C. MacKinnon, for defendant, respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—In this case the plaintiff sued the defendant for $100, being two months' rent at $50 per month, for certain property in Regina verbally leased by the plaintiff to the defendant. On the trial of the action the learned District Court Judge dismissed the action with costs, and the plaintiff now appeals.

For the purposes of this appeal the following statement of facts will be sufficient. On the 23rd October, 1913, and for a number of months before that, the defendant held certain premises of the plaintiff as his tenant at a rental of $50 per month, payable in advance on the 1st day of each month. The tenancy was a monthly tenancy, and the term began on the first day of each calendar month. On the 23rd October, 1913, the defendant gave the following written notice to the plaintiff:—

"J. A. Westman Agency,
Financial Agents,
Regina, Canada, Oct. 23.

Mr. Gordon Baker, Regina:

Dear Sir:—I will not require your house, 2048 Angus Street, any longer than the 15th of Nov. I will see you on the 4th and in the meantime will keep my eyes open for a new tenant. I will vacate any time should you have an opportunity of renting same.

Yours truly,
(Sgd.) V. C. McCurdy."

The defendant first paid the rent up to the middle of November in accordance with his notice, and shortly after quitting the premises on November 14th paid rent for the balance of the month of November. The key of the house was returned to the plaintiff about the 2nd December. On these facts the only question left for our decision is whether the letter of October 23rd, is a sufficient notice to quit.

Except in the case of a tenancy from year to year, the length of the notice to quit has not been fixed precisely. The general principle is that in the absence of special stipulation, "reasonable" notice must be given, and in the case of weekly and monthly tenancies it has been repeatedly held from very early times that a notice equal in length to the period of the tenancy is sufficient. It would seem to be still a question of fact in each case whether any shorter notice is reasonable. (See cases cited in Vol. 18 of Halsbury, p. 445.) In this case the notice is given on the 23rd October for the 15th November, and is, in my opinion, bad, because it does not expire on and with the last day of the period of the tenancy. Doe d. Spicer v. Lea (1809), 11 East. 312.

It remains then to consider whether the notice in question can be held to be effective for the 30th November.

It cannot be so held, in my opinion. The notice was given for the 15th November, and rent was paid up to that date, shewing an unequivocal intention on the part of the defendant to put an end to his tenancy on that date. There is nothing in the notice upon which to found an inference in favour of an intention of the defendant to give notice to quit at the end of the monthly period, that is, on the last day of November.

The appeal, therefore, should be allowed, and the judgment in the Court below set aside, and judgment entered for the plaintiff for $100 and his costs of action. The appellant will also have his costs of this appeal.

Appeal allowed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

COURT OF APPEAL.

REX v. HOLDERMAN.

Criminal Law — Obtaining Goods by False Pretences — Charge to Jury—Misdirection — Seed Grain Mortgage—Chattel Mortgage Act, R. S. S. ch. 144, sec. 17—Agreement to Give Valid Chattel Mortgage—Not Necessary that Seed Grain Sold be Sown on Land Covered by Mortgage—Sufficiency of Evidence to Support Conviction — New Trial Ordered.

Upon the trial of a person accused of obtaining a quantity of wheat by false pretences the Judge expressed the opinion in his charge to the jury that in order that a seed grain mortgage be valid, under the Chattel Mortgage Act, R. S. S. ch. 144, the seed grain, the price of which was secured by the mortgage, must be sown on the land covered by the mortgage, and that if they came to the conclusion that all the grain was not sown on the land covered by the mortgage that the accused would be guilty of false pretences in inducing the vendor to sell him the grain upon his agreeing to give a valid mortgage for the price thereof if at the time of such inducement the accused knew that he was not going to use all the grain for seed grain purposes.

Held, that the fact that the accused did not use all the grain for seed grain purposes, but sold some of it, did not invalidate the mortgage under the Act and that, therefore, the above direction to the jury was a misdirection since the mortgage to be valid must contain only the date of the purchase of the seed grain, the number of bushels purchased, the price thereof per bushel, and the affidavit of *bona fides* of the mortgagee.

Case reserved by LAMONT, J., for the opinion of the Supreme Court en banc.

The Court consisted of NEWLANDS, BROWN, and ELWOOD, JJ.

H. E. Sampson, for the Crown.

H. Y. MacDonald, K.C., for accused.

BROWN, J.:—The following case was reserved by my brother Lamont for the opinion of this Court:

"The accused was charged before me with having obtained a quantity of wheat by false pretences. The evidence, which was not disputed, shewed that one S. W. Treat owned

a farm near Imperial, and had thereon a tenant by the name of Koenig. Treat was represented at Imperial by his agent, Frank Parks. The accused went to Koenig and asked him if he had any seed grain for sale, saying that he required 275 bushels to sow, that he had no money, but that he would give a seed grain mortgage for the purchase-price. It appears that the preceding year he had purchased wheat from the same parties and had given a seed grain mortgage therefor. Koenig stated that he had the wheat, but that he could not sell it without first consulting Mr. Parks. He saw Parks, who agreed to allow the accused to have the grain on the condition mentioned by him, and Koenig so informed the accused. The accused and his man then went over and obtained two loads of the wheat, one load of which was placed in the accused's granary, and the other was taken the next day to the elevator and sold. The following day they returned and obtained two more loads, one of which was taken to the elevator and sold. The accused obtained 275 bushels altogether, and sowed on his farm 180 bushels. Some time later the accused saw Parks and gave him a seed grain mortgage on the south-east quarter of 20-27-25 and the north-west quarter of 28-27-25. He had no interest whatever in the north-west of 28-27-25.

"For the accused it was contended that, as he obtained the wheat on the promise to give therefor a seed grain mortgage, there had been no representation of a fact either past or present which was shewn to be false. I instructed the jury that the statement made by the accused that he required 275 bushels to sow could be interpreted as a declaration on his part that he was farming in such a large way that he required 275 bushels to seed the land which he was sowing in wheat; and that the statement that he would give a seed grain mortgage for the price thereof implied that he was in a position to give a valid seed grain mortgage therefor; and that, if these were false to the knowledge of the accused and were made with the fraudulent intent of inducing Koenig or Parks to part with the wheat, and as a result thereof they did part with it, that they could find the accused guilty of obtaining by false pretences the wheat which he took to the elevator and sold. The jury found the accused guilty.

"The questions reserved for the Court are:

(1) Was I right in so instructing the jury?

(2) Was there evidence on which the jury were entitled to convict the accused?'"

Dealing first with the second question submitted, the following evidence of Koenig shews what actually took place:

"Q. What took place between you and him (the accused) at that time? A. He came and asked me if I had any wheat to sell. I told him I had. He said, 'I would like to have 275 bushels of wheat, to sow.' He said he didn't have the money to pay for it, but said he would give a seed grain mortgage on it. I told him I could not sell it to him until I seen Mr. Parks, the agent."

After Koenig had seen Parks he again interviewed the accused, and the following evidence shews what occurred:—

"His Lordship: Well you say he asked you then, 'Have you seen Mr. Parks?' and you said to him, 'Yes, you can have it under that condition.' Is that exactly the way it was put? A. Yes, that is the way it was put."

A false pretence is a representation, either by words or otherwise, of a matter of fact either present or past which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation. Criminal Code, sec. 404. To fully appreciate the force of the language used by the accused, it is necessary to have in mind sec. 17 of the Chattel Mortgage Act, ch. 144 R. S. S., and which, in view of another phase of this case, it seems to me advisable to quote in full:—

"17. No mortgage, bill of sale, lien, charge, incumbrance, conveyance, transfer or assignment hereafter made, executed or created, and which is intended to operate and have effect as a security shall in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future in whole or in part be valid except the same be made, executed or created as a security for the purchase price and interest thereon of seed grain.

(2) Every mortgage or incumbrance upon growing crops or crops to be grown, made or created to secure the purchase price of seed grain shall be held to be within the provisions of this Act and the affidavit of bona fides among the other necessary allegations shall contain a statement that the same is taken to secure the purchase price of seed grain.

(3) No mortgage or incumbrance to secure the price of seed grain shall be given upon any crop which is not sown

within one year of the date of the execution of the said mortgage or incumbrance.

(4) Every registration clerk shall be entitled to receive the same fees for his services as provided for under sec. 35 of this Act.

(5) Every such seed grain mortgage so taken and filed shall not be affected by or subject to any chattel mortgage or bill of sale previously given by the mortgagor or by any writ of execution against the mortgagor in the hands of the Sheriff at the time of the registration of such seed grain mortgage but such seed grain mortgage shall be a first and preferential security for the the sum therein mentioned; the date of the purchase of seed grain, the number of bushels purchased and the price thereof per bushel must be stated in the mortgage as well as in the affidavit of bona fides."

The accused wanted grain; he had no money to pay for same; but by his statement he evidently knew that he had the right to give a chattel mortgage on his crop to be grown to secure the purchase-price thereof. Under the circumstances, what meaning is the language which he used in getting the grain reasonably capable of conveying? It seems to me that it might be said, as stated by the learned trial Judge, that he thereby represented that he was farming in such a large way that he would require during that year for seed wheat 275 bushels, or, to say the least, that his present farming prospects and plans were such that he would require that amount of grain for seed. Taking the interpretation which is more favourable from his point of view, I am of opinion that the language used would constitute a false statement of fact within the meaning of the Code, assuming, of course, that he had no such prospects or plans as suggested. In Rex v. Cooper, 13 Cox C. C. 617, the accused was charged with falsely pretending that he was a dealer in potatoes, and as such dealer, in a large way of business and in a position to do a good trade in potatoes and able to pay for large quantities of potatoes, as and when the same might be delivered to him. The only evidence thereof was the following letter from the prisoner to the prosecutor:—

"Dear sir:—Please send me one truck of Regents and one truck of Rocks as sample at your prices named in your letter. Let them be of good quality, and then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours truly, William Cooper.

P.S.:—I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on."

It was held that the false pretences alleged were proved, the letter reasonably conveying to the mind the construction put upon it in the indictment. Lord Coleridge, C.J., is reported at p. 620, as follows:—

"The question for the Court, as I understand the case, is whether there was evidence upon which the false pretences alleged in the indictment could fairly be sustained. The indictment alleges that the prisoner falsely pretended that he was a dealer in potatoes, and as such dealer then was in a large way of business, and that he was in a position to do a good trade in potatoes, and that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, and that a large quantity of potatoes was obtained by means of those false pretences. It is not contended by the prisoner's counsel that if the false pretences were truly alleged in the indictment they were not negatived by the evidence. The question is whether the letter set out in the case, which was the only evidence of the false pretences, sustains the allegations thereof in the indictment. At first I was under the impression that it was enough for the prisoner to shew that the false pretences alleged to be conveyed by the letter to the prosecutor did not necessarily arise from the letter, but that if the letter would bear an innocent construction the charge would not be made out; but upon consideration I am satisfied that that was a mistaken view, and that it was a question for the jury whether the false pretences alleged did or did not reasonably arise from the letter. I have no desire to protect persons who conduct their business in a loose and careless manner, but at the same time we must be guided in our decisions by the principles of the criminal law. The true principle applicable to this case was well enunciated by Blackstone, J., during the course of the argument in Reg. v. Giles, 'It is not requisite that the false pretence should be made in express words, if the idea is conveyed."

Denman, J., at p. 622, says:—

"In Reg. v. Giles, the prisoner pretended that she had power to bring the prosecutrix's husband back, and that was held to be a statement of fact. That warrants us in holding that where a man is not in a position to do what he pro-

fesses he will do at a given time, he is making a false statement of fact. The indictment charges that the prisoner falsely pretended that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, and that pretence, I think, is proved by the letter."

And Pollock, B., on the same page, says:—

"Having heard the whole of the argument, I have come to the conclusion that the conviction should be affirmed. It is not sufficient for the prisoner to shew that the letter might bear another meaning, if it is reasonably capable of bearing the meaning imputed to it in the indictment. It is the duty of the prisoner to shew by special circumstances that it bore the construction he contends for. I think that the false pretences charged may be fairly inferred from the letter, and that the conviction should be affirmed.

In the case Edgington v. Fitzmaurice, 29 L. R. Ch. D. at p. 483, Bowen, L.J., is reported as follows:—

"There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."

The evidence goes to shew that neither at the time the wheat was obtained nor at any time thereafter did the accused have any need for 275 bushels of seed wheat. As a matter of fact he had only a quarter-section of land, and even had he cultivated the whole quarter and seeded it in wheat he would not have required 275 bushels. He apparently had only 120 acres under cultivation, and in order to sow that amount required only 180 bushels of grain. This, together with the very important evidence that he, almost immediately after the purchase, sold a large quantity of the grain, goes to shew that the representations of the accused were false and were fraudulently made. The accused gave a mortgage on the 120 acres actually sown to secure the whole of the purchase-price, and this, in my opinion, constitutes a valid mortgage for the whole price to the full extent of the grain grown on the 120 acres. But it will be necessary for me to deal with this point at greater length when I am considering the first question submitted. The representations made were

such that their truth or falsity was a material element in the value of the security promised, and can I think, be fairly said to have been an inducing cause to the vendor to part with his grain. The vendor would have a right to expect that the accused would sow enough land to require the 275 bushels as seed, and that the chattel mortgage could and would be given on the grain to be grown on that amount of land. In the case of Edgington v. Fitzmaurice (supra), Bowen, L.J., at p. 483, says:—

"Then the question remains—Did this misstatement contribute to induce the plaintiff to advance his money? Mr. Davey's argument has not convinced me that it did not. He contended that the plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material. But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact."

As to the second question, therefore, I am of opinion that there was ample evidence on which the jury could convict.

Dealing with the first question submitted: the learned trial Judge in his charge to the jury used the following language:—

"Now, to give a seed grain mortgage upon the land he could only give, under the statute, a valid mortgage for what was used for seed grain purposes, and if he bought more wheat than what he needed for seed grain purposes, and you are satisfied that at the time he bought it he knew he was not going to use it for seed grain purposes, and that he could not give a valid seed grain mortgage for that grain which he was going to sell then that is obtaining seed by false pretences to the extent which he bought over and above the amount that was bought that was necessary to sow the southeast quarter of 20."

The consideration of this portion of the charge requires an examination of sec. 17 of the Chattel Mortgage Act above quoted. The object aimed at by the Legislature, as appears

from an examination of this section, is in my opinion to enable farmers who are in need of seed grain and who are not in a position to pay cash for the same to nevertheless secure sufficient for their need. They are put in the position of being able to give to the vendor security on crops not yet in existence, and this security is made preferential. There is nothing in the language of the statute which would confine the security given to the crop grown from the seed actually furnished. To so construe the statute would mean that the vendor of seed grain would at the risk of losing his security, or, having no security at all, be compelled to see that the grain sold was actually sown. This would be practically impossible unless the vendor himself sowed the grain. In that view of the law, I venture to suggest that very few men would want to part with their grain, and what appears to me to be the very object of the statute would be defeated. I am of opinion that it is sufficient if the vendor bona fide sells the grain for seed purposes, and that he can take a valid security for the purchase-price on any crop whether the same be grown from the seed sold or not. The accused would therefore be able to give a valid mortgage on the crop grown on the south-east quarter of section 20 to secure the price of all the grain purchased.

I am therefore of the opinion that the learned trial Judge erred in his charge to the jury on this point, and as the jury may have been influenced by that portion of the charge, a new trial should be ordered.

ELWOOD, J., concurred with BROWN, J.

NEWLANDS, J.:—The seed grain mortgage given by the accused was filed in the wrong registration district, and was therefore invalid against subsequent purchasers, and the accused, having assigned his interest in the crop, the mortgagee, Parks, was unable to recover the amount secured thereby. The learned Judge in his charge to the jury said:—"For the purposes of this case I am not going to ask you to consider whether or not he had altogether parted with his interest for that year in the crop grown upon sec. 20. I am going to ask you to assume that, having an interest in the property he had the right to place a seed grain mortgage upon that land for whatever amount of seed was necessary to sow the south-east quarter of section 20, that, having done

that, for the purposes of this case that seed grain mortgage was a valid mortgage to the extent of the grain sown upon that quarter section. What was that? You have the evidence of one of the witnesses before Hyde that there was 150 bushels sown upon the quarter section; but you have the evidence of Hyde, who was farming the land, although the accused actually sowed the grain, that he sowed 120 acres, and 1½ bushels to the acre which would amount to 180 bushels of seed grain."

"Now, to give a seed grain mortgage upon the land he could only give, under the statute, a valid mortgage for what was used for seed grain purposes, and if he bought more wheat than what he needed for seed grain purposes, and you are satisfied that at the time he bought it he knew he was not going to use it for seed grain purposes, and that he could not give a valid seed grain mortgage for that grain which he was going to sell, then that is obtaining seed by false pretences to the extent which he bought over and above the amount that was bought that was necessary to sow the south-east quarter of section 20."

The statute which the learned Judge referred to is the Chattel Mortgage Act, ch. 144, R. S. S. Section 17 of that Act provides that no mortgage, etc., which is intended to have effect as a security on any growing crop or crop to be grown in future shall be valid except the same be made as a security for the purchase price of seed grain. Sub-section (2) provides that the affidavit of bona fides among the other necessary allegations shall contain a statement that the same is taken to secure the purchase price of seed grain, and sub-sec. (5) provides that the date of the purchase of the seed grain, the number of bushels purchased and the price thereof per bushel, shall be stated in the mortgage as well as in the affidavit of bona fides. And this sub-sec. further provides that such a mortgage shall be a first and preferential security for the sum therein mentioned. The mortgage given contained these particulars as well as the affidavit of bona-fides, and would have been such a security as far as the south-east quarter of section 20 was concerned if it had been filed in the proper registration district.

The learned trial Judge's opinion as expressed in his charge to the jury is that in order that a seed grain mortgage be valid, the seed grain, the price of which is secured by the mortgage, must be sown on the land covered by the mort-

gage, and that therefore the mortgage in question was valid only for the price of the 180 bushels sown on the south-east quarter of section 20, and invalid as to the balance of the grain which the accused sold. Is this a correct interpretation of the statute in question? I am of the opinion it was not. The statute makes no mention of where the seed grain is to be sown. The mortgage to be valid must contain only, the date of the purchase of seed grain, the number of bushels purchased, and the price thereof per bushel, and the affidavit of bona fides which is taken by the mortgagee must contain the same information and a statement by him that the same is taken to secure the purchase price of seed grain. It was not, in my opinion, the intention of the legislature that the seller should have to follow the grain to see that it was sown upon the land mentioned. This would be a practical impossibility unless the vendor sowed the grain himself. The sale must on his part be a bona fide sale of seed grain, and he must swear to that fact, but he is required to go no further, and if the requisites of the statute are complied with his security is a valid one. In this case the statute was complied with, and therefore the mortgage given by the accused was a first and preferential security upon the crop grown upon the south-east quarter of section 20.

Now, the inducement upon which the vendor sold the grain was that the accused would give him a valid mortgage for the price thereof, and as he was given this, there is no fraud on the part of the accused. As it subsequently turned out this mortgage was no security, but that was the fault of the mortgagee. He filed his mortgage in the wrong registration district, and it was therefore invalid as against subsequent purchasers for value. As this state of affairs could not have been in the contemplation of either party at the time of the sale of the grain or the giving of the mortgage, it does not affect the question I am considering.

The learned Judge was therefore wrong in telling the jury: "Now, to give a seed grain mortgage upon the land he could only give, under the statute, a valid mortgage for what was used for seed grain purposes, and if he bought more wheat than what he needed for seed grain purposes, and you are satisfied that at the time he bought it he knew he was not going to use it for seed grain purposes, and that he could not give a valid seed grain mortgage for that grain which he was going to sell, then that is obtaining seed by

false pretences to the extent which he bought over and above the amount that was bought that was necessary to sow the south-east quarter of section 20."

What the reasons of the accused were for including the quarter of section 28 in which he had no interest in the mortgage are not given, but the fact that this quarter was included would not invalidate the mortgage on the quarter that he owned and on which a crop was sown. At the time he purchased the wheat no land was mentioned. He simply said he would give a seed grain mortgage for the price. This was, in my opinion, the inducing cause for the sale of the wheat to him. Subsequent events shew that at the time he made this statement he did intend to give a valid seed grain mortgage for the price, and it was therefore not a false pretence. The amount of wheat he wanted would have nothing to do with the sale if he could give a valid seed grain mortgage for the price, and therefore if it was not made to induce the vendor to sell him the wheat it was not a false pretence.

I am of the opinion that the learned Judge was wrong in instructing the jury as he did, and that both questions should be answered in the negative.

The conviction should therefore be quashed.

New Trial Ordered.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

MARTIN HARGREAVES CO. v. WRIGLEY.

Promissory Note—Infancy—Hearsay Evidence of, Inadmissible—Notice of Dishonour—Waiver—Bills of Exchange Act, sec. 106, sub-sec. (b) 2.

Held, that in an action on a promissory note where the endorser set up the defence of infancy, the said defence could not be supported by the endorser's own evidence of the date of his birth, which information he got from his mother, and from a copy of a certificate of his birth, since the said evidence was hearsay.

Held, under sec. 106 sub-sec. (b) 2 of the Bills of Exchange Act, that an endorser of a promissory note who, being aware of an omission to give him due notice of dishonor, gives a written promise to pay the note thereby waives the notice and is liable on the note.

An appeal from the trial judgment in favour of plaintiff in an action on a promissory note.

The appeal was heard by HAULTAIN, C.J., NEWLANDS, ELWOOD, and BROWN, JJ.

T. Lynd, for defendant, appellant.

Stevenson, for plaintiff, respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an action against the defendant as endorser of a promissory note. There is also a claim against the defendant on a written guarantee signed by him to pay said note.

The defence is infancy; that no notice of dishonour was given to him; and as to the guarantee, that there was no consideration for the signing of the same.

The only evidence to support the defence of infancy was the defendant's own evidence of the date of his birth, which information he got from his mother, and from a copy of a certificate of his birth. This evidence was objected to at the trial, and was subsequently ruled out by the learned trial Judge. This ruling is appealed against. Upon this question I will only cite Haines v. Guthrie, 13 Q. B. D. 818, where the Court of Appeal, in an action for goods sold and delivered, the defence being infancy, held that an affidavit made by the deceased father of the defendant in another action could not be admitted on the ground that it was hearsay evidence, and did not come within the exceptions to the general rule against the admission of hearsay evidence. The learned trial Judge was therefore right in refusing to admit this evidence. Upon the other defences he held that there being no notice of dishonour, the defendant was released from his liability on the note, but that he was liable on his written guarantee.

This guarantee was as follows:—

"July 3rd, 1913.

Messrs. Martin & Hargreaves, Ltd.,
City.

Gentlemen,

re R. S. B. Burton.

With reference to the note held by you and given to me by the above named party I promise to pay up this amount within 30 days from this date.

Yours truly,

J. Brooke Wrigley."

This finding is also appealed against. I have not considered the learned Judge's reasons for holding defendant liable on this guarantee, because I am of the opinion that this letter, being a promise to pay the amount of the note after it was due, is a waiver of notice of dishonour, and therefore defendant is liable on the note as endorser.

Section 106 of the Bills of Exchange Act, sub-sec. (b) says waiver may be express or implied, and sub-sec. 2, to that section says, that notice of dishonour may be waived after omission to give due notice. In Cordery v. Colvin, 14 C. B. N. S. 374, Byles, J., said: "A promise to pay is an acknowledgment of liability. Here the subsequent promise was either evidence of the fact of notice having been received, or that it had been waived."

In Woods v. Dean, 3 B. & S. 101, Blackburn, J., said: "When a promise to pay is made by the endorser of a bill with full knowledge of the facts, and he is aware that he has had no notice of dishonour, that is equivalent to agreeing that he will not take advantage of the want of notice; in other words is a waiver of the right to notice."

These cases were followed by the Supreme Court of Nova Scotia in McFabridge v. Williston, 25 N. S. R. 11. In this case McDonald, C.J., points out what the facts are of which defendants had to have full knowledge. He says (p. 15): "He knew that he had endorsed these notes, that they were in the hands of the plaintiff as endorsee, that the maker had not paid them at maturity or at all, and payment was demanded from him by the holder."

The defendant in this case had knowledge of all these facts, and was aware that he had received no notice of dishonour at the time he gave the written promise to pay the note. He therefore waived the notice, and is liable as an endorser of the note.

The appeal should be dismissed with costs.

Appeal dismissed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

CAMPBELL, WILSON AND STRATHDEE LTD. v. GHIZ AND SOLIMAN.

Promissory Note — Holder for Collection Fraudulently Endorsing to Holder in Due Course—Liability of Maker and Endorser—Bills of Exchange Act, secs. 53, 54, 546.

A., being indebted to B., gave him her promissory note. B. endorsed it over to C. for collection. C., the manager of a company which was indebted to D., in fraud of B., endorsed it to D. before it was due on account of the indebtedness of the said company.

Held, that D. was the holder in due course of the note under sec. 546 of the Bills of Exchange Act, and as such was entitled to recover thereon against A. and B., the maker and the endorser.

Held, that even if the fraud of C. amounted to theft, the holder in due course would not be precluded from recovering on the note.

Venables v. *Barry Bros. & Co.*, [1892] 3 Ch. D. 527; *Raphael* v. *Bank of England*, 17 C. B. 160: applied.

Appeal from the judgment of a District Court Judge in favour of the defendants in an action on a promissory note.

The appeal was heard by HAULTAIN, C.J., NEWLANDS, and LAMONT, JJ.

T. D. Brown, for plaintiff, appellant.

No one, for defendants, respondents.

NEWLANDS, J.:—The defendant Ghiz being indebted to defendant Soliman gave him her promissory note dated March 12th, 1913, for the sum of $200 payable three months after date. The defendant Soliman endorsed it over to one Moses Salloum for collection on his (Soliman's) account. Moses Salloum was manager for Salloum & Co., who were indebted to the plaintiff company. After obtaining possession of the note Moses Salloum in fraud of the defendant Soliman endorsed it before it was due to the plaintiff company on account of the debt due by Salloum & Co. to them. Frederick Hockin, the credit manager of plaintiff company, gave the following evidence at the trial:—

"The note was given to me by Moses Salloum for Salloum & Co. Salloum & Co. owed us money. We refused to ship

more goods until they gave us security or paid us some money. We had the note as security for our goods. Salloum & Co. still owe us $426. We are still the owners of the note. We had no knowledge of any fraud in connection with the note."

Section 53 of the Bills of Exchange Act provides that valuable consideration for a bill may be constituted by (b) an antecedent debt or liability. Section 54 provides that "where value has at any time been given for the bill the holder is deemed to be a holder for value as regards the acceptor, and all parties to the bill who become parties prior to such time."

Section 546 is as follows:—

"A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

(a) That he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact;

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

These provisions of the Bills of Exchange Act apply to promissory notes.

The plaintiffs being holders in due course are therefore entitled to recover.

The learned trial Judge, however, held:—

"I find on the evidence that the plaintiffs took no title to the note sued on, that the note was stolen by Moses Salloum, and endorsed over to the plaintiffs."

I cannot agree with the findings that the plaintiff company took no title to this note. There were no circumstances in connection with their taking this note which would create any suspicion in their minds. In the London Joint Stock Bank v. Simmons, [1892] A. C. 201, it was held that a person taking a negotiable instrument in good faith and for value obtains a valid title though he takes from one who has none. Halsbury, L.C., at p. 212, says:—

"The broad proposition laid down by Abbot, C.J., (3 B. & C. 47), that whoever is the holder of a negotiable instrument 'has power to give title to any person honestly acquiring it' seems to me to be decisive in this case."

In Venable v. Barry Bros. & Co., [1892] 3 Ch. D. 527, where stolen securities which were held to be negotiable instruments were taken by plaintiff for value, Kekewich, J., at p. 543, says:—

"The question is whether, before the day on which the money was advanced on the faith of these bonds—that is, before the moment of the advance—Mr. Venable, through his agent in Paris, was aware that these bonds were in fact stolen, so that their depositor could not make a good title to them, notwithstanding their negotiability. I have no evidence before me that either the plaintiff or his agent had any such knowledge; and, therefore, I must hold that the plaintiff is entitled to the declaration he asks—namely, a declaration that these particular bonds, with particular numbers and the coupons attached thereto, are his property as against the defendants."

Raphael v. Bank of England, 17 C. B. 160, is to the same effect.

The appeal should therefore be allowed with costs.

LAMONT, J.:—This is an action against the maker and endorser of a promissory note. The defendant Ghiz, being indebted to the defendant Soliman, gave him the note in question. Soliman endorsed it to one Moses Salloum for collection, and Salloum was to hand the money to Soliman when collected. Salloum was manager for Salloum & Co. Salloum & Co. were indebted to the plaintiffs. After getting the note, Moses Salloum endorsed it to the plaintiffs. The note not being paid, the plaintiffs sued both maker and endorser. The learned District Court Judge before whom the action was tried held that the circumstances under which Moses Salloum got the note amounted to theft, and that therefore the plaintiffs acquired no title thereto. I do not think the evidence establishes that Salloum stole the note, but even if it did, that is not a defence to the plaintiffs' action if the plaintiffs are the holders in due course of a negotiable instrument. Venable v. Barry Bros. & Co., [1892] 3 Ch. D. 527; Raphael v. Bank of England, 17 C. B. 160. The evidence, however, does establish beyond question that Salloum negotiated the note to the plaintiffs in breach of faith. This is fraud, 2 Hals. 500. Section 58 of the Bills of Exchange Act provides that "every holder of a bill (and this

applies to a promissory note) is prima facie deemed to be the holder in due course, but if in an action thereon it is admitted or proved that the acceptance, issue or subsequent negotiation of the instrument is affected with fraud, duress or force and fear, or illegality," the holder cannot recover unless he establishes that subsequent to such fraud, etc., value in good faith has been given for the bill. See also Tatan v. Haslar, [1899] 23 Q. B. D. 245. The circumstances under which the plaintiffs acquired the note in question are related by Frederick Hockin, the plaintiffs' credit manager, as follows:—

"The note was given to me by Moses Salloum for Salloum & Co. Salloum & Co. owed us money. We refused to ship more goods until they gave us security or paid us some money. We had exhibit 'A' (the note sued on) as security for our goods. Salloum & Co. still owe us $426. We are still the owners of the note. We had no knowledge of any fraud in connection with the note."

This evidence not being in any way questioned establishes that the plaintiffs took the note without notice of its fraudulent negotiation. They therefore took it in good faith. Did they take it for value? Section 53 of the Act reads as follows:—

"Valuable consideration for a bill may be constituted by,—

(a) Any consideration sufficient to support a simple contract;

(b) An antecedent debt or liability."

It was contended on the argument that the plaintiffs had shipped further goods to Salloum & Co. on the strength of this note, and that that was sufficient consideration. It would be sufficient consideration if the evidence shewed that the goods were shipped. There is, however, no evidence upon which I can find that they were. Hockin did not say so in his testimony, or if he did, it does not appear in the notes, and it being one of the important points in the case, I would expect it to appear there had he testified in reference to it. The ledger account was put in as an exhibit. That account contains an item for goods delivered to Salloum & Co. after the date on which the plaintiffs received the note. Yet Hockin did not testify that the account was correct or that the goods there set out had been delivered. The onus is on the plaintiff to establish that he gave value, and so far as the shipment of further goods on the strength of obtaining the

note is concerned, I am of opinion that they failed to do so. Then did the plaintiffs take it as security for an antecedent debt? If the account of Salloum & Co. was due and payable at the time the plaintiffs took the note as security, the plaintiffs are the holders in due course. Currie v. Misa, L. R. 10 Ex. 162. But they cannot be considered as holders in due course if Salloum & Co.'s account was not presently payable. Bank of B. N. A. v. McComb, 21 M. L. R. 58. In his evidence, Hockin says:—

"Salloum & Co. owed us money. We refused to ship more goods until they gave us security."

While this evidence is not too satisfactory, considering that the onus was on the plaintiffs, I think the reasonable inference from the words, "owed us money" is that the amount was due and payable at that time, which was the time they took the note. That being so, the antecedent debt of Salloum & Co. was a valuable consideration, and the plaintiffs are entitled to recover.

I would allow the appeal, with costs.

HAULTAIN, C.J., concurred in the result.

Appeal allowed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

NEWTON v. HUSSON.

Promissory Note — Presentment for Payment — Waiver — Bills of Exchange Act, sec. 92—Equities.

Held, under sec. 92 of the Bills of Exchange Act, that a promise by the maker of a note to pay it after it becomes due with the knowledge that it had not been presented for payment constitutes a waiver of presentment and the maker is liable on the note.

Held, that the endorsee of an overdue promissory note takes it subject to the equities attaching to it in the hands of the payee from whom he acquires it.

Appeal from the trial judgment in favour of defendant in an action on a promissory note.

The appeal was heard by HAULTAIN, C.J., NEWLANDS, and LAMONT, JJ.

T. P. Morton, for the plaintiff, appellant.

A. A. Fisher, for defendant, respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an action on a promissory note made by defendant in favour of Elliott & Elliott, and endorsed by them to the plaintiff after the same became due and was dishonoured. The defence was that the note was not presented for payment and the learned trial Judge found that it had not been presented and, following Jones v. England, 5 W. L. R. 83, he held that the plaintiff could not recover. On reading over the evidence I was of the opinion that there was evidence of presentment but without considering that question further I am of the opinion that defendant waived presentment.

Section 92 of the Bills of Exchange Act provides that:—

"Presentment for payment is dispensed with (e) by waiver of presentment express or implied." A large number of cases have decided that a promise to pay after the bill is due with knowledge of the facts is a waiver. These cases are collected in MacLaren on Bills and Notes, 4th ed., at p. 260. In his examination for discovery put in at the trial, defendant said that plaintiff asked him to pay the note after it was due and he promised him to pay $100 on it, "$50 now, and $50 in the fall."

This, I think, waives presentment.

As the plaintiff took the note after it was due he took it with the equities attaching to it in the hands of the payees Elliot & Elliot from whom he got it. The consideration for the note was legal services rendered by them to defendant, for which they sent him an account which was put in at the trial. Defendant disputes part of this account. It should therefore be taxed, and the defendant's liability on the note be restricted to the amount due by him to them. That is all Elliot & Elliot could collect on the note, and is therefore all plaintiff can recover, he having taken it from them after it became due.

The appeal should be allowed with costs. There should be a reference to the clerk of the Court to take the bill of

costs of Elliot & Elliot put in at the trial, and judgment entered for the plaintiff for the amount so found to be due, not exceeding the amount due on the note sued on, with costs.

Appeal allowed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

BARTHELS, SHEWAN & CO. v. SLOANE ET AL.

Bulk Sales Act—Real Estate—Furniture in Hotel—Hotel License.

Held, that the Bulk Sales Act does not apply to the sale of real estate, or the furniture used in a hotel.

By sec. 6 of the Bulk Sales Act, the said Act is made applicable to the sale of a liquor license; but where there was a sale by a hotel-keeper of all stock which he had on hand, including the license, it was *held*, under sec. 3 of the Act, that the sale of the license could not be set aside as contravening the Act unless it was shewn that the vendor or some one on his account was paid some part of the purchase price of the license.

Appeal from the judgment of a District Court Judge in favour of the defendants in an action to set aside a sale as contrary to the Bulk Sales Act.

The appeal was heard by HAULTAIN, C.J., NEWLANDS, and LAMONT, JJ.

T. P. Morton, for plaintiffs, appellants.

Newcombe, for Strathcona Brewing Co. and Green & Co., defendants, respondents.

Stewart, for A. Goyette, defendant, respondent.

NEWLANDS, J.:—This is an action to set aside a sale as contrary to the Bulk Sales Act. The facts are briefly that the defendant Sloane owned an hotel situate on lots 1, 2, and 3, block 3, plan E. Q. Vonda, which had a liquor license. The defendants Strathcona Brewing & Malting Co. and Green & Co. Ltd., had mortgages on this hotel. These mortgages were subsequent to a mortgage to the Hoeschen-Wentzler.

Brewing Co. Ltd., for $10,800, which that company was foreclosing, and in order to protect their own security these two defendants agreed to buy the hotel from defendant Sloane. The agreement by which this sale was carried through recites the consideration as $1, and other valuable considerations, these other valuable considerations being the above mentioned mortgages. It also provides that Sloane is to remain in possession until the 3rd of March, 1913, the agreement being executed on the 14th February, previously, and that on that date he is to give up peaceable possession of the premises, and transfer the license to them or such parties as they shall appoint, and further provides for the payment to Sloane of $500 for giving up possession and transferring the license. Sloane covenants that the property is free from liens, &c., excepting a chattel mortgage to the Strathcona Brewing & Malting Co. Ltd. This property was afterwards sold by the two defendant companies to the defendant Goyette, and the liquor license was transferred direct from Sloane to Goyette. The $500 was never paid to Sloane because there were other liens on the property.

The Bulk Sales Act, ch. 38 of the Acts of 1910-11, applies to sales in bulk of "any stock of goods, wares and merchandise." It does not therefore apply to the sale of the hotel premises, nor to the fixtures and furniture therein, as the furniture of a hotel cannot be considered "goods, wares and merchandise ordinarily the subject of trade and commerce," as provided by sec. 6. The part of the property affected by the Bulk Sales Act would therefore be confined to the stock of goods for sale in the bar, the liquor license (sec. 6) and probably the provisions, etc., used for sale to the guests at their meals; and therefore the only amount of money that could be in question is the $500 mentioned in the agreement.

Now the evidence shews that the defendant companies did not purchase the stock of goods which were for sale in the bar, and dining room, as they gave Sloane permission to retain the hotel for over two weeks and to sell these goods without accounting to them, neither did they wish to buy the license, but they made provision in the agreement by which Sloane was to receive $500 for the transfer of this license. The defendant companies sold the hotel property to defendant Goyette and transferred the license direct from Sloane

to him, but they did not pay Sloane the $500 agreed because of liens on the premises.

I am of the opinion that this sale is not therefore a sale under the Bulk Sales Act. That Act does not apply to the sale of the real estate or to the furniture used in the hotel, and there were no goods, wares or merchandise contained in the sale from Sloane other than the license, and the license by itself is not ordinarily the subject of trade and commerce as provided by sec. 7 of the Act.

I think the appeal should be dismissed with costs.

LAMONT, J.:—The learned Judge of the District Court who heard this case set out the facts as follows:—

"The defendant, George Sloane, was the owner of lots 1, 2, and 3, in block 3, plan "E. Q.," in the village of Vonal, in the province of Saskatchewan. Upon these lots there was a hotel in which this defendant carried on business. The property was subject to a first mortgage to the Hoeschen-Wentzler Co. This defendant subsequently mortgaged the lands and the chattels to the defendants, the Strathcona Brewing & Malting Co., of Edmonton, and Green & Co., of Winnipeg, to secure certain indebtedness to them. The first mortgagees had taken proceedings under their security and the lands were about to be sold. Before the sale these two defendants entered into an agreement with Sloane, dated 14th February, 1913. That agreement is expressed to be in consideration of $1, "and other valuable consideration." Under it, Sloane agreed that he would, on the 3rd March, 1913, transfer to the Strathcona Brewing & Malting Co. and Green & Co., possession of the hotel property above described, and that he would assign, transfer and deliver over to them all his right, title and interest in the hotel furniture, fixtures, stock-in-trade, goods, chattels and effects "now upon the said property which are the property of the party of the second part." Sloane also agreed to transfer the liquor license to such persons as these two should require and to do everything to enable them to obtain the license. These parties further agreed, in consideration of Sloane's giving up possession of the premises, property, stock and contents and making the transfer of the license, to pay to him the sum of $500. Sloane was, under this agreement, to have the right to occupy the premises and carry on the hotel business until March 3rd, 1913. In pursuance of

this agreement, and on the same day it was executed, Sloane also executed a transfer of the lots and of the license. The name of the transferees in these documents was left blank. Sloane knew that the documents were blank to this extent when he signed them and that they were so left with the intention that the Strathcona Co. and Green & Co. should be able, upon finding a purchaser themselves, to make these documents effective by filling in the name of such purchaser. Subsequently the hotel and business were sold by the Strathcona Co. and Green & Co. to the defendant, Goyette. Goyette, at the time of the purchase by him, knew nothing of the transaction as between Sloane and the Strathcona Co. and Green & Co. At the time Sloane executed these documents he was indebted to the plaintiff and to a number of other creditors as well. In taking the transfers of the property and business, the Strathcona Co. and Green & Co. did not ask for the statement provided for by the Bulk Sales Act, nor did Sloane give to them any statement whatever regarding his liabilities."

On these facts the plaintiffs contend that the sale from Sloane to the defendant companies was one to which the Bulk Sales Act, ch. 38 of the Acts of 1910-11, applied, and as the provisions of that Act had not been observed the sale was void as against Sloane's creditors. On the other hand, the defendants contend that this is simply a case of mortgagees taking possession, and that therefore the Bulk Sales Act has no application."

The Bulk Sales Act applies to sales in bulk of any stock of goods, wares or merchandise ordinarily the subject of trade and commerce. It does not include furniture or fixtures in a hotel, but by sec. 6 it does expressly include a hotel license. By the agreement of February 14th, Sloane agreed to transfer to the defendant companies his hotel property and the stock of goods he would have on hand on March 3rd, and the hotel license. The consideration for the hotel property and the stock was the satisfaction of a mortgage of the Hoeschen-Wentzler Brewing Co. amounting to $10,800 and two mortgages covering the property itself and the fixtures, stock-in-trade and furniture held by the defendant companies. The consideration for the transfer of the license was expressed to be $500. The defendant companies resold to Goyette, and he took possession March 4th. The stock-in-trade of liquors, etc., amounted only to $1,000 or $2,000,

and it was not disputed that the chattel mortgages held by the defendant companies amounted to far more than the value of the fixtures, furniture and stock-in-trade included in them. The defendant companies, therefore, had a right to the stock under their mortgages, and they gave no consideration therefor except the satisfaction of these securities, which were a first claim on the stock. There was nothing coming to Sloane from the taking over of the stock by the defendant companies, and therefore nothing coming to Sloane's unsecured creditors.

The $500 to be paid for the license stands in a different position. It was the purchase-price of that which the statute has expressly declared to be included in the term "stock." The sale was a sale in bulk of all stock which Sloane had on hand on May 3rd, including the license. What the defendant companies in effect did was to purchase the stock-in-trade, including the license, for $500, they assuming the chattel mortgages registered against the stock. The validity of these mortgages is not in question. The purchase-money in which Sloane's creditors can be interested is only this $500. This $500, according to the evidence, has not been paid. Sloane says he never got it, and did not know what became of it. The agent of the defendant companies who gave evidence at the trial was not asked about it. So far as the evidence shews, it has still to be paid over. There was some suggestion that the defendants kept it and applied it on liens on the property which Sloane had agreed to pay off, or that they applied it on other claims which they had against Sloane. Had either of these facts been established, I am of opinion the sale would have to be set aside as being in contravention of the Act, but there is no evidence I can find that any part of that $500 had been paid to the vendor or anyone on his account. By sec. 3, one of the conditions precedent to setting aside the sale is that the purchaser must pay some part of the purchase-money or deliver some security therefor to the vendor or some other person for his use, without taking the steps provided in the Act for the protection of the creditors. The reason for this is that if the purchaser pays any part of the purchase-money to the vendor, the amount available for the satisfaction of the creditors is decreased by that amount. In this case the plaintiffs have failed to shew that any part of the $500 has been paid to the vendor or anyone on his behalf, or that the whole purchase-

money is not still available for Sloane's creditors. That being so, the appeal should be dismissed with costs, but I think it should be without prejudice to the right of the plaintiffs to bring another action to set aside the sale when they can shew that the $500 or any part thereof has been paid to the vendor or to some other person for his use or on his account. The defendant companies, in my opinion, would not be entitled to appropriate it to other indebtedness of their own, nor to liens against the property which Sloane had agreed with them to pay off. They should pay the purchase-money into the hands of the official assignee to be distributed pro rata among the creditors in which case they can claim their share for their other indebtedness.

HAULTAIN, C.J., concurred with LAMONT, J.

Appeal dismissed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

LUMBER MANUFACTURERS' YARDS, ET AL. v. THOMPSON.

Judgment—Signed in Default of Appearance—Motion to Set Aside—Writ Requiring Appearance in Non-existing Office—Entry of Judgment a Nullity—Action to Enforce Mechanics' Lien—Merits of Defence — Jurisdiction of Acting District Court Judge to Entertain Application to Set Aside Judgment of Trial Judge—Rule 133.

Where judgment was signed in default of appearance to a writ which required the entry of an appearance in the office of the "local registrar of this Court," instead of in the office of "the clerk of this Court," there being no local registrar of the said Court, it was *held*, that the entry of judgment was a nullity and that until the writ was amended judgment could not be signed under it.

Held, that, under Rule 133, a Judge of the District Court acting for the trial Judge, in the judicial district in which a judgment is entered has jurisdiction to entertain an application to set aside the said judgment.

An appeal from the judgment of the acting Judge of the District Court in an action to enforce two mechanics' liens.

The appeal was heard by HAULTAIN, C.J., NEWLANDS, and LAMONT, JJ.

T. J. Blain, for defendant, appellant.

P. M. Anderson, for plaintiff, respondent.

LAMONT, J.:—This action was brought in the District Court to enforce two mechanics' liens registered against the south-east quarter of 20-25-26, west of the 2nd, one by the Lumber Manufacturers' Yards, Ltd., and the other by the Reliance Lumber Co., Ltd. The writ of summons notified the defendant that if he disputed the claim he should, within twenty days from the service of the writ upon him, cause an appearance to be entered for him "in the office of the local registrar of this Court." It further notified him that in default of his so doing "the plaintiffs may proceed in the said action and judgment may be given in your absence and without further notice to you." On being served, the defendant wrote the following letter:

"Liberty, Sask., April 18, '14.

The Registrar of District Court,
Regina.

Dear Sir:

Was brought action against by the Manufacturers' and Reliance Lumber Companies last fall. Am enclosing receipts which will shew that the action is unjust. If this can be fixed up without my appearing I would be very obliged to you. If my presence is necessary will you please write me at once when to appear?

Yours very truly,
A. C. Thompson."

A reply to this letter was sent to Thompson by the clerk of the District Court informing him that if he wished to defend he must cause an appearance to be entered for him within the time specified in the writ of summons. No appearance was entered in the office of the clerk of the District Court, and the plaintiffs moved for judgment and for an order that the land set out in the lien be sold to satisfy the plaintiffs' claim, and on May 15th, 1914, an order was made accordingly. On becoming aware that this order had been made, the defendant moved to set it aside on the following grounds:—

(1) That the plaintiffs' judgment was irregular, inasmuch as the writ notified him to enter an appearance in the

office of the local registrar of the Court, when, as a matter of fact there was no local registrar of the District Court;

(2) That the plaintiffs had no valid liens upon the property sought to be sold;

(3) That the defendant had a good defence on the merits to at least a part of the amount claimed;

(4) That he had not had any notice of the plaintiffs' proceedings otherwise than by the service of the writ upon him.

The acting Judge of the District Court before whom the matter came, held that he had no jurisdiction to deal with the matter—for what reason, does not appear. From his decision this appeal is taken.

The first point to be considered is, was the order for judgment in default of appearance properly made? It was based upon the non-appearance of the defendant as established by the affidavit of H. J. Coutu, who stated that he had searched in the office of the clerk of the Court at Regina for the purpose of ascertaining if any appearance had been entered for the defendant in the action, and that no appearance had been entered. The writ called for an appearance of the defendant in the office, not of the clerk of the Court, but of the "local registrar of this Court." There is no local registrar of the District Court.

In Anlaby v. Prætorius (1888), 20 Q. B. D. 764, a judgment was signed before the expiry of the time limited for appearance, and the Court set it aside as a nullity, because the lapse of the proper time was a condition precedent to the plaintiff's right to sign judgment. In Appleby v. Turner (1900), 1 P. R. 145, Mr. Justice Street set aside a judgment as a nullity because the plaintiffs had entered it without first filing the writ and the affidavit of service which the rules of Court required them to do. In this case it was also held that the defect was not curable by delay or acquiescence on the part of the defendant. See also Hoffman v. Crerar, 18 P. R. 473.

In Hamp-Adams v. Hall, [1911] 2 K. B. 942, a writ of summons was issued and served. The English rule required the person serving the writ to endorse on the writ the day of the month and week of service thereof within three days at most after service, otherwise the plaintiff was not at liberty in case of non-appearance to proceed by default. This endorsement was not made until the sixth day of service. The

defendant did not appear, and the plaintiff signed judgment. On application by the defendant, the judgment was set aside. In that case Buckley, L.J., stated:—

"Where a plaintiff proceeds by default, every step in the proceedings must be strictly complied with. This is a matter strictissimi juris. That has not been done, and on this ground I am of opinion that the judgment must be set aside."

In Bank of Hamilton v. Baldwin (1913), 28 O. L. R. 175, through a mistake of the plaintiff's solicitors and an officer of the Court, the summons ran in the name of King Edward VII. instead of King George V. Upon the writ being served, the defendant moved to set it aside, and the plaintiff moved to be allowed to amend. It was held that the issue of the writ in that form was not a nullity but an irregularity which could be remedied.

The principle running through these cases is that where something is required to be done before the plaintiff is entitled to enter judgment in default of appearance, that constitutes a condition precedent, the non-performance of which vitiates any judgment which may be entered thereon. Our rules provide for the entering of judgment in case the defendant does not appear to the writ. Non-appearance is therefore a condition precedent to the plaintiff's right to have judgment entered for him. The only proof of non-appearance furnished was an affidavit that no appearance had been entered in the office of the "clerk of the Court." The defendant, however, was not called upon to enter an appearance in the office of the clerk of the Court, and his failure to do something which he was not required by the writ to do cannot, in my opinion, give the plaintiff a right to enter judgment against him. "A judgment unwarranted by any enactment or rule is much more than an irregularity." Per Lord Herschell in Smerthwaite v. Harvey, [1894] A. C. 494. In my opinion, therefore, the entering of the judgment was a nullity. The writ may be amended, but until it is amended the plaintiff cannot sign judgment under it.

Rule 133 provides that "any order made by the Court or Judge under any of the rules of this order, and any judgment entered pursuant to such order, may be set aside or varied by the Court or a Judge upon such terms as may be just." As to the meaning of the words "a Judge" in this rule, I agree with the conclusion reached by my brother

Brown in Morin v. Dupuis, where he held that an application to set aside a judgment entered at the trial in default of appearance of the plaintiff need not be made to the trial Judge, but was properly made to the local master. For the reasons therein given, I am of opinion that the Judge of the District Court who was acting for the trial Judge in the judicial district in which the judgment herein was entered had jurisdiction to entertain the application.

The defendant also shews a good prima facie defence on the merits. He alleges that the plaintiff had no valid lien at the time he began this action. In his affidavit the defendant says (and no attempt has been made to contradict him) that in April, 1912, he arranged with the agent of the Lumber Manufacturers' Yards for sufficient lumber to build a house and agreed to give his promissory note for the price thereof payable in the fall of 1912 immediately upon the lumber being furnished; that the lumber was furnished in April, 1912, and in the month of June he attended at the office of the Lumber Manufacturers' Yards and gave his note for $180.75, the price of the lumber furnished, which, he says, was accepted in full settlement of the account. The note was not paid. The defendant had no further dealings with the Lumber Manufacturers' Yards until September, 1913, when he purchased from them sufficient lumber to build two grain bins. The bill for this lumber was $54.35. On October 14th, 1913, he paid $50 on account of this lumber, and on April 2nd, 1914, he paid the balance and received a receipt which reads, "By cash to settle account, $6.15." On October 8th, 1913, the plaintiffs registered their lien in the lands titles office at Moose Jaw and included therein the lumber supplied in April, 1912, as well as the lumber supplied in September, 1913, which went into the two grain bins—evidently attempting to obtain a lien for the lumber which had been settled for by note more than a year before by tacking it on to the lien to which they might be entitled through supplying the lumber for the grain bins.

The lien of the Reliance Lumber Co. is even more objectionable. The defendant states that in November, 1912, he purchased lumber from the Reliance Lumber Co. for a stable, under an agreement that he was to give in settlement his promissory note payable in the fall of 1913. The lumber was delivered on or before November 6th, 1912. In January he went to give his note as agreed. There had been a

change of managers at the company's office, and the note was not taken. In May, 1913, pursuant to a request from the company, the defendant went to the company's office to settle. The agent refused to take the defendant's note in settlement unless he would buy some more lumber. The defendant says he told the agent that he did not want any more lumber and would not buy any, and again offered his note in settlement. The agent positively refused to take the note unless the defendant would buy a few shingles and some boards. The defendant did not understand why the agent was anxious to sell him a few boards, but as the lumber he wished him to buy amounted to only $2.50, he took it and gave the company his note. The company then filed a lien dated May 20th, 1913, covering not only the $2.50 worth of lumber taken in May, but also the account of the previous November. It was not disputed that at the time the second purchase of lumber in each case was made the time had elapsed within which the lien could be filed protecting the former purchases. The lumber supplied under the second purchase in each case had absolutely nothing to do with the lumber supplied on the former occasions.

These facts, which are prima facie, at least, established, shew a good defence to the action, as the subsequent purchases of the lumber from each of the plaintiff companies could not have the effect of extending the time for the registration of liens in respect of the first purchases.

I am therefore of opinion that the appeal should be allowed with costs, the judgment and all subsequent proceedings set aside and the defendant allowed to defend ex debito justitiae. Plaintiff should pay the defendants' costs of application to set aside judgment.

NEWLANDS, J.:—I agree that judgment should be opened up and defendant allowed in to defend on payment of costs.

HAULTAIN, C.J., agreed with LAMONT, J.

Appeal allowed.

PRIVY COUNCIL.

NOVEMBER 6TH, 1914.

JUDICIAL COMMITTEE.

MILLER, ET AL. v. HOWARD.

Land Registry Act—Vendor and Purchaser—Unregistered Instrument—Admissibility of, as against Purchaser from Registered Owner under Agreement for Sale of Land—Registration of Agreement—Action for Specific Performance—Rectification of Register—Sec. 92—Vendor under Agreement for Sale Trustee only to Extent to Which Court Would Declare Specific Performance—Person Not Party to Agreement Claiming Adverse Interest to Defendant Joined as Co-Defendant—Misjoinder.

Plaintiffs brought action for specific performance of an agreement, dated 1st of June, 1908, made between defendant S. and plaintiff M. whereby S. agreed to sell and M. to purchase 4.14 acres of land. Defendant H. was joined as co-defendant on the ground that she claimed an interest in the property adversely to her co-defendant S. Defendant H. besides resisting the claim for specific performance against her, set up her own title to the property as heiress-at-law of her father, the deceased former husband of her mother S. In order to prove her title as against the plaintiffs who disputed it, H. to prove her title as against the plaintiffs who disputed it, H. put in 3 indentures: An indenture dated 23rd August, 1893, whereby a certain block of land, of which the 4.14 acres in question formed part, was conveyed to H.'s father and S., her mother, in fee simple, as joint tenants; an indenture dated the 14th June, 1905, whereby H.'s father conveyed to S. his wife, an undivided moiety of the whole block in fee simple, thus vesting the whole block in her; an indenture also dated the 14th of June, 1905, whereby S. conveyed to her husband the entirety of the 4.14 acres in question. On 30th July, 1907, S. took both of the deeds of 14th July, 1905, to the Land Registry Office for registration, and owing to some misconception on the part of the registrar obtained registration in her name in the Register of Absolute Fees: the second deed of the 14th July, 1905, being absolutely ignored, though the registrar had possession of it. The plaintiff M. in entering into the agreement of June 1st, 1908, was accordingly misled by the register and the certificate of title obtained by S. Plaintiff M. registered his agreement under sec. 74 of the said Act on the day after it was signed, but in his application for registration he did not state the nature of the interest in respect of which he claimed registration as required by Form D. in the First Schedule to the Act. S. admitted the title of H.

Held, that the joinder of M. as a co-defendant was a misjoinder since there was no equitable principle by virtue of which land could be taken away from the true owner under colour of specific performance of a contract to which he was not a party and which he did not authorize to be made on his behalf.

Held, that the general principle of equity that under a contract for the sale of an interest in land the vendor becomes the trustee for the purchaser of the interest contracted to be sold subject to a lien

for the purchase-money is only true if and so far as a court of equity would under all the circumstances of the case grant specific performance of the contract and that, therefore, the plaintiff M., by the registration of his agreement, became the registered owner of an interest commensurate with the interest which, under all the circumstances, equity would decree by way of specific performance of the agreement.

Held, that the admission by S. of the title of H. was sufficient to rebut the *prima facie* title conferred upon S. by registration under the Act as owner of the Absolute Fee.

Held, that the second deed of the 14th of June, 1905, was not, under sec. 75 of the Act, admissible in disproof of the registered title of plaintiff, M., but since the latter was registered only in respect of an interest commensurate with the relief which equity would decree by way of specific performance of the agreement of 1st July, 1908, the defendant H. was not under the necessity of in any way disputing the title in question, and that, therefore, the said deed was admissible not as disproving the title of the plaintiff, M., but as a material circumstance which the Court must take into account in deciding the extent to which specific performance ought to be granted.

Held, that, under sec. 92 of the Land Registry Act, that the Court had power to make such order as might meet the justice of the case, including an order rectifying the register, where no application was made to stay the action and no objection made on the ground that no security had been given and no issue filed as provided by the said section.

Held, that sec. 75 imposes a penalty upon non-registration of an instrument by rendering such instrument inadmissible in evidence in certain cases, but has no further effect.

An appeal from the Supreme Court of Canada.

The appeal was heard by a Board composed of LORD MOULTON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

The judgment of the Board was delivered by:

LORD PARKER OF WADDINGTON:—In this case the plaintiffs claim specific performance of an agreement dated the 1st of June, 1908, and made between the defendant, Mary Jane Sheard, of the one part, and the plaintiff, Miller, of the other part, whereby the defendant, Mary Jane Sheard, contracted to sell, and the plaintiff, Miller, to purchase, some 4.14 acres of land in the Vancouver district in British Columbia. The plaintiff, Nicholson, is made a co-plaintiff as sub-purchaser of the property from the plaintiff, Miller. The defendant, Mildred Howard, is joined as co-defendant on the ground that she claims an interest in the property adversely to her co-defendant. In their Lordships' opinion this joinder is misconceived and the judgment given at the trial, and confirmed on appeal for specific performance against the defendant, Mildred Howard, and the vesting of her interest in

a trustee for the plaintiffs is erroneous and cannot be sustained. There is no equitable principle by virtue of which land can be taken away from the true owner under colour of specific performance of a contract to which he was not a party and which he did not authorize to be made on his behalf. The action should have been dismissed with costs so far as the defendant, Mildred Howard, was concerned.

So far the case presents little difficulty, but there is a more important question which must be decided before this appeal is finally disposed of. Besides resisting the claim for specific performance as against her, the defendant, Mildred Howard, set up her own title to the property. She was, she said, entitled to it as heiress-at-law of the late Harry Howard, the former husband of the defendant, Mary Jane Sheard, subject nevertheless to the dower interest of her mother, the last-named defendant, and she counterclaimed against the plaintiffs and her co-defendant for a declaration to that effect with certain consequential relief. The defendant, Mary Jane Sheard, did not defend the counterclaim, which against her must be taken as admitted. As against the plaintiffs, however, who did defend the counterclaim, the defendant, Mildred Howard, was put to the proof of her title. In order to prove it she put in three indentures. First, she put in an indenture dated the 23rd August, 1893, whereby a certain block of land, of which the 4.14 acres in question formed part, was conveyed to Harry Howard and his wife, the defendant, Mary Jane Sheard, in fee simple, as joint tenants. Secondly, she put in an Indenture dated the 14th of June, 1905, whereby Harry Howard conveyed to his wife, the defendant, Mary Jane Sheard, an undivided moiety of the whole block in fee simple, thus vesting the whole block in her. Thirdly, she put in an indenture, also dated the 14th of June, 1905, whereby the defendant, Mary Jane Sheard, conveyed to Harry Howard the entirety of the 4.14 acres in question. The two deeds of the 14th of June, 1905, in fact operated as a partition of the block between husband and wife.

The indentures above referred to, if admissible in evidence, are, in their Lordships' opinion, sufficient proof of the title set up by the defendant, Mildred Howard, but the plaintiffs contend that the second indenture of the 14th June, 1905, is not admissible in evidence against them, because of the provisions of section 75 of the Land Registry

Act (chapter 23 of the statutes of the Province of British Columbia, 1906), being an Act consolidating the existing statutes as to the registration of titles to land.

On reference to this statute it will be found that it contemplates and provides for four registers. First, there is a Register of Indefeasible Fees. A certificate of title to an estate so registered is, as long as it remains uncancelled, conclusive evidence against all the world that the holder is entitled to the estate mentioned in the certificate (sections 15, 16 and 81). Secondly, there is a Register of Absolute Fees. The registered owner of an absolute fee is to be deemed to be the prima facie owner of the land referred to in the register for such an estate as he legally possesses therein, subject only to such registered charges as appear existing thereon, and to the rights of the Crown (secs. 15 and 24). The certificate of title is not conclusive, but only prima facie evidence of the title of the registered owner. It is to be observed that nothing less than a legal fee simple can be registered as an absolute fee. Thirdly, there is a Register of Charges (sec. 25), that is, according to the definition clause (sec. 3), any less estate than an absolute fee, and any equitable interest in land, and any incumbrance, Crown debt, judgment, mortgage, or claim to or upon any real estate.

The registered owner of a charge is to be deemed to be prima facie entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as appear existing thereon and to the rights of the Crown (sec. 29). The certificate of title is not conclusive, but only prima facie evidence of the title of the owner of a registered charge.

It is to be observed that an applicant for the registration of a charge has in his application to state the nature of the charge in respect of which he requires registration (Form D in 1st Schedule to the Act), and the register has also to state the nature of the registered charge (Form E, same Schedule).

Lastly, there is, under sec. 116, a register in which are entered copies of all instruments affecting land. The 74th section of the Act provides that no instrument executed after and taking effect after the 30th June, 1905, and no instrument executed before the 1st July, 1905, and taking effect after the 30th June, 1905, purporting to transfer, charge, deal with or affect land or any estate or interest therein

(with an immaterial exception) shall pass any estate or interest, either at law or in equity, in such land, until the same shall have been registered in compliance with the provision of the Act; and the 75th section provides that instruments executed before and taking effect before the 1st July, 1905, transferring, charging, dealing with, or affecting land or any estate or interest therein, unless registered before the said date (with an immaterial exception) shall not be receivable by the Court or any Court of law or any registrar or examiner of titles as evidence or proof of the title of any person to such land as against the title of any person to the same land registered on or after the 1st July, 1905, except in an action before the Court questioning the registered title to such land on the ground of fraud wherein the registered owner has participated or colluded. This section, in their Lordships' opinion, imposes a penalty on non-registration of an instrument by rendering such instrument inadmissible in evidence in certain cases, but has no further operation.

Returning to the facts of this case, it appears that, after Harry Howard's death, the second deed of 14th June, 1905, came into possession of the defendant, Mary Jane Sheard, and that on the 30th July, 1907, she took both the deeds of the 14th June, 1905, to the Land Registry Office in Vancouver for registration. What happened in the office is obscure, but owing possibly to some misconception on the part of the registrar, the defendant, Mary Jane Sheard, ultimately signed an application prepared by him declaring she was owner of the land in question, and claiming to have it registered in her name in the Register of Absolute Fees, and obtained such registration; the second deed of the 14th June, 1905, being absolutely ignored, though the registrar had possession of it and ought to have been aware of its effect. In this, if there was no fraud, there was evidently a serious miscarriage, and the plaintiff, Miller, in entering into the agreement of the 1st June, 1908, to purchase the land in question was, undoubtedly, misled by the register and the certificate of title obtained by the defendant, Mary Jane Sheard.

The agreement of the 1st June, 1908, was, in their Lordships' opinion, an instrument purporting to affect land, and, therefore, required registration under the 74th section of the Act. When so registered (but not before), it would confer on the plaintiff, Miller, an equitable interest, his title to which would be registrable in the Register of Charges.

On the day after the agreement was signed, the plaintiff, Miller, lodged an application for the registration of his title to a charge by virtue of the agreement, but in such application he did not, as he ought to have done, state the nature of the interest in respect of which he claimed registration. It is material to consider what this interest really was. It is sometimes said that under a contract for the sale of an interest in land, the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of equity would, under all the circumstances of the case, grant specific performance of the contract.

The interest conferred by the agreement in question was an interest commensurate with the relief which equity would give by way of specific performance, and if the plaintiff, Miller, had in his application attempted to define the nature of his interest, he could only so define it. Further, if the registrar had, as, in their Lordships' opinion, he ought to have done, specified on the register the nature of the interest which he registered as a charge, he could only have so specified it. Had he attempted further to define the interest, had he, for example, stated it as an equitable fee subject to the payment of the purchase money, he would have been usurping the function of the Court, and affecting to decide how far the contract ought to be specifically performed. As a matter of fact, the registrar did not, any more than the plaintiff, Miller, attempt to define the interest in respect of which registration was granted. He granted registration, having (their Lordships will assume) first entered a copy of the agreement in the Register of Instruments, under sec. 116, but the register merely shews that the plaintiff, Miller, is entitled to a charge under the agreement on the land in question, and leaves the nature of the charge to be inferred. At most, therefore, the plaintiff, Miller, became the registered owner of an interest commensurate with the interest which, under all the circumstances, equity would decree by way of specific performance of the agreement.

Their Lordships are now in a position to deal with the question as to whether the second deed of the 14th June, 1905, was admissible in evidence. First, as regards the defendant, Mary Jane Sheard, it was not (having regard to

the 75th section of the Act) admissible to disprove the prima facie title conferred on her by her entry on the register as owner of the absolute fee, unless such entry had been obtained by fraud in which she had participated or colluded. But as a matter of fact it was quite unnecessary to adduce the deed as evidence against her at all. She did not defend the counterclaim, thereby admitting the title of the defendant, Mildred Howard, as alleged in the counterclaim, and, further, she had on two several occasions admitted this title before the commencement of the litigation, first, in her affidavit for the purpose of obtaining letters of administration to Harry Howard's estate, and, secondly, in proceedings which she took (apparently at the instigation of the plaintiff, Miller) to have the agreement of the 1st June, 1908, adopted by the Court on behalf of the defendant, Mildred Howard. These admissions, unless satisfactorily explained, would, in their Lordships' opinion, be sufficient to rebut the prima facie title conferred by registration.

Again, as regards the plaintiff, Miller, it is quite true that by reason of the 75th section, the second deed of the 14th June, 1905, is not admissible in disproof of his registered title, but if, as their Lordships have pointed out, he is registered only in respect of an interest commensurate with the relief which equity would decree by way of specific performance of the agreement of the 1st June, 1908, the defendant, Mildred Howard, is not under the necessity of in any way disputing the title in question. She adduces the deed of the 14th June, 1905, not as disproving the plaintiffs' title, but as a material circumstance which the Court must take into account in deciding the extent to which specific performance ought to be granted. In their Lordships' opinion, therefore, the objection to the admissibility in evidence of the second deed of the 14th June, 1905, cannot be sustained, and the defendant, Mildred Howard, is therefore entitled to the declaration of her title as alleged in her counter-claim.

The defendant, Mildred Howard, asks also for certain consequential relief by way of rectification of the register and cancellation of existing certificates of title. The Court under section 92 of the Act has jurisdiction in an action contesting a registered title to make such order as may be just and appropriate under the circumstances. According to this section, before such an action can be brought, the pro-

posed plaintiff should file an issue and give security to the satisfaction of the registrar, and it is possible that the plaintiffs might have obtained a stay of the counterclaim till this had been done. They did not, however, apply for such a stay, nor did they make any objection before their Lordships' board on the ground that no security had been given and no issue filed. In their Lordships' opinion, therefore, it was open to the Courts below to make and is open to their Lordships to advise His Majesty to make such order under the 92nd section as may meet the justice of the case.

With regard to the relief to which the plaintiffs are entitled in this action, it would be contrary to all principle to order the defendant, Mary Jane Sheard, to convey an interest which she has not got and which she cannot convey. The plaintiffs are, however, entitled to repayment of all monies paid to her under the agreement of the 1st June, 1908, with interest at 4 per cent. per annum, and their costs of action (except in so far as increased by the joinder of her co-defendant), and a lien for such monies, interest, and costs on her dower interest in the land in question.

Taking all the circumstances into consideration, their Lordships are of opinion and will humbly advise His Majesty (1) that the orders appealed from should be discharged; (2) that the action should be dismissed with costs throughout as against the defendant, Mildred Howard; (3) that on the counterclaim of the last-named defendant there should be a declaration that notwithstanding the entry on the register she is absolutely entitled to the land in question subject to the dower interest therein of the defendant, Mary Jane Sheard, and that the register should be rectified by striking out the entry of the defendant, Mary Jane Sheard, as owner of the absolute fee in the land in question and entering the defendant, Mildred Howard, as owner of such absolute fee subject to the dower interest of the defendant, Mary Jane Sheard, which dower interest should be entered in the Register of Charges, and that the certificate of title granted to the defendant, Mary Jane Sheard, should be delivered to the registrar for cancellation, and that the plaintiffs should pay the costs of the counterclaim; (4) that the defendant, Mary Jane Sheard, should be ordered to repay to the plaintiffs the monies already paid by the plaintiff, Miller, under the agreement, with interest at 4 per cent. per annum, and the costs of the action (except so far as in-

creased by the joinder of the defendant, Mildred Howard), and that it should be declared that such monies, interest, and costs, are a lien on the dower interest of the defendant, Mary Jane Sheard, in the land in question, and that the registrar amend the certificates of title issued to the plaintiffs so as to conform with this report; and (5) that plaintiffs should pay the costs of this appeal.

THE

Western Law Reporter

VOL. XXX. TORONTO, JAN. 4, 1915. No. 3

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

LAYZELL v. PROCTOR.

Bailor and Bailee — Horse Injured by Kick of Stallion — Scienter—Negligence—Domestic Animals.

Held, that it was not necessary to prove *scienter* in an action against a blacksmith for damages for injuries to a horse received from the kick of a stallion while both animals were in the possession of the said blacksmith for the purpose of being shod.

Held, that the act of the blacksmith in leading the horse within reach of the stallion's hind feet without taking precaution to avoid danger constituted negligence, it being common knowledge to persons accustomed to horses that stallions, although in a sense domestic animals, are dangerous.

An appeal by defendant from the judgment of His Honour Judge Winter awarding plaintiff damages for injuries to a horse left by him with the defendant to be shod, the said injuries having been caused by the kick of a stallion.

The appeal was heard by SCOTT, STUART, BECK, and SIMMONS, JJ.

M. B. Peacock, for plaintiff, respondent.

John E. Brownlee, for defendant, appellant.

BECK, J.:—This is an appeal from the decision of His Honour Judge Winter.

The action was for damages for injuries to a horse entrusted to the defendant, a blacksmith, for shoeing, which was being led out of the blacksmith shop by the defendant

or his servant and was kicked by a stallion, which had also been entrusted to the defendant for shoeing and was there in the shop being shod.

On the evidence the learned Judge found the defendant guilty of negligence, and gave judgment for the plaintiff.

The learned Judge held that scienter, i.e., a knowledge on the part of the defendant that the stallion had kicked on a previous occasion, was not a necessary element of the plaintiff's case; that the defendant was negligent in leading another horse within reach of the stallion's hind feet without taking precaution to avoid the danger of his kicking by reason of the common knowledge of persons accustomed to horses that stallions, though in a sense domestic animals, are dangerous.

I supplement the reasons and authority upon which he based his judgment by the decision in an American case, Hammond v. Melton, 42 Ill. App. 186.

"The owner of a domestic animal is bound to take notice of the general propensities of the class to which it belongs and must anticipate and guard against them if of a nature to cause injury, for he necessarily knows that the act will be committed if opportunity offers. So the keeper of a stallion is bound to take notice of the well known propensities of stallions in general and to use such degree of care to avoid injury from such propensities as the nature of the case may reasonably require; but he is under no obligation to guard against injuries which he has no reason to expect from the animal, either on account of the propensities of stallions in general or some disposition of the individual animal of which he has notice."

I would affirm the decision on the ground stated by the learned Judge and dismiss the appeal with costs.

STUART, J.:—This is an appeal from a judgment of His Honour Judge Winter whereby he gave judgment for the plaintiff for $350 damages and costs.

The defendant is a blacksmith whose ordinary occupation consists along with other work in shoeing horses for customers. The plaintiff had brought four horses into the defendant's shop to be shod. While they were in the building a stallion belonging to one Thompson was brought in to be shod. The work upon the plaintiff's horses was completed and it became necessary to remove them in order to make way

for other animals. The defendant or his servants proceeded to lead the four animals out a door into a yard and in doing so they led them past the stallion. At this time another servant of the defendant was occupied in shoeing the stallion and had one of his feet lifted up. Three of the plaintiff's horses got past safely, but just as the fourth was going past the man working at the stallion, having finished with its foot, let it down and instantly the stallion wheeled and kicked the fourth horse then going past and injured it so that it died.

The learned trial Judge said in concluding his judgment "that he thought that the defendant had omitted to exercise proper and reasonable care in leading the plaintiff's horse out of the smithy within reach of the stallion's hind feet and in not taking some precaution to restrain the stallion while he was being shod."

It seems fairly well established in the evidence, and from reading the reasons for judgment I think the trial Judge found that the stallion was not standing directly parallel to the wall in which the door was and that his hind feet were therefore not directly towards the horses as they were led past, but that he was standing rather, though perhaps not entirely, parallel to the line along which the horses were being led.

Now, although the trial Judge apparently finds that the negligence consisted in two separate things, I have come to the conclusion that whatever negligence is to be charged against the defendant must after all rest largely though perhaps not entirely upon the last of the two grounds mentioned.

The matter will be made clearer as it presents itself to my mind if we consider what the position would have been if the plaintiff had hired his horse out to some third party who under this bailment was bound to exercise reasonable care and if this third party had taken them to be shod, and had, after the shoeing was finished, led them himself past the stallion, so that the defendant's servants had nothing to do with the leading them past at all. Would that third party, if he had seen the stallion standing there being shod with one foot up in the hands of the blacksmith, have been guilty of omitting to exercise reasonable care in doing so? I assume that he knew merely that the animal was a stallion and knew, if he thought of it at all, as much as the blacksmith, about the time being the breeding season, which was a matter to which some importance seemed to be attached

in so far as the disposition of the animal was concerned. In my opinion such a person would not have been chargeable in such circumstances with negligence. I think he could not reasonably have been expected to appreciate that there would have been any danger in leading the horses past a stallion that appeared to be standing quietly enough and moreover had one foot held up by a workman.

So that I think after all the real basis of any charge of negligence against the defendant must be the fact that he was then in charge of the stallion, and should, so it may be urged and was decided by the trial Judge, have taken precaution to prevent him injuring horses properly brought within possibility of physical contact with him. Of course being at the same time bailee of both horses, it was open to him to avoid injury either by taking better control of the stallion or if he so choose as an alternative, by keeping the other horses in his charge away from the stallion. And this is no doubt really what the learned trial Judge meant. But after all I think it is obvious that the real basis of liability, if any, must be his obligation as bailee of the stallion, or perhaps one should say as bailee of both animals and not merely as bailee of the one injured.

Being both bailee of the stallion and also of the plaintiff's horses, he would owe a greater duty to the plaintiff in respect of control of the stallion than he would to a man who had control of his own horses and to this extent the fact that the defendant was a bailee of the plaintiff's animal is a material one to be considered.

It was contended by counsel for the appellant that it is a case in which "scienter" must be alleged and proved. I think this argument is based on some misapprehension. The statement of claim alleges that "while they (i.e., the plaintiff's horses) were thus in the defendant's charge, the said defendant negligently placed a stallion alongside of the horses owned by the plaintiff, &c." Now, I have no doubt that the appellant's contention would be right, the plaintiff had t-tempted to meet liability upon some especial peculiarity of the individual stallion itself from all other stallions. The directions of "scienter" as I understand it, is not applicable at all to the general characteristics of a certain class of animals. It refers to a particular characteristic of a particular animal. The reference in the claim to the stallion "being a vicious one" was not, I take it, intended as any-

thing more, or at least should not be treated as against the defendant, as anything more, than a mere explanation of how the animal happened to kick and not as stating any special ground of liability.

With regard to wild animals, a person keeping them is liable at all events. With regard to tame animals he is, of course, liable for any damage they do through his negligence subject, of course, to local statutes and rules as to animals running at large and as to fences. Also as a very especial ground of liability, the owner of a particular animal, belonging to the domestic class, which is known to him to have a vicious habit, is liable, if in consequence of its vicious propensity, and as an exercise of it it injures any one. But aside from wild animals and tame animals within the particular case, a vicious propensity, there can be no liability except for negligence, but in arriving at the standard of reasonable care to be applied, of course, the general characteristic of the particular class of animal in question, which a defendant in control of it must be held to have knowledge, or to be taken into account.

It seems clear that persons in the position of the defendant who take into their charge horses or animals belonging to different persons and keep them in close proximity to each other are obliged to use reasonable care to see that they do not injure each other. This would apply to liverymen, blacksmiths, &c.

The case was tried by His Honour Judge Winter, sitting as a Judge of fact and therefore as a jury and it was for him to decide whether the standard of reasonable care had been observed. In a clear case where the facts are not in dispute it is of course open to this Court to reverse a finding of an omission to take reasonable care and to adopt a standard of its own because we have power to make references of fact, but I think this power should be exercised only where we can say that the trial Judge was clearly and obviously wrong. Though I have some little doubt whether too high a standard may not have been adopted by the learned trial Judge, I am unable to conclude that he really was too exacting in regard to the duty of the defendant and I therefore think we ought not to interfere with the view he took.

It was stated that the parties were really friendly and wanted a decision upon the law as to the defendant's liability. But aside from the question of scienter the parties got no

decision on law except an application of the well known doctrine of reasonable care. The decision of the trial Judge and of this Court will be no precedent which a jury at least would be bound to follow if they were trying a similar case in the future. They would be at liberty to apply their own standard of resonable care.

The appeal should be dismissed with costs.

SCOTT and SIMMONS, JJ., concurred in result.

Appeal dismissed.

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

CANADIAN PACIFIC RAILWAY v. WATTS.

Carriers — Consignor and Consignee — Receipt of Goods — Freight Charges—Liability for—Inference of New Contract to Pay—Ownership of Goods—Agency.

The consignor of goods is primarily liable for the freight charges.

The consignor remains liable notwithstanding that a railway company has delivered the goods without demanding the freight charges from the consignee.

It is a question of fact to be determined by reference to the particular case whether the receipt of the goods by the consignee creates a new contract to pay the freight charges in consideration of the railway company giving up its lien.

No evidence of such a new contract is to be inferred where the railway company knows that the consignee at the time received the goods as agent for the owner.

An appeal from the trial judgment in favour of plaintiffs in an action for freight charges on goods shipped to the defendant who received them as agent for the consignor.

The appeal was heard by SCOTT, STUART, BECK, and SIMMONS, JJ.

John Barnett, for the defendant, appellant.

G. A. Walker, for the plaintiffs, respondents.

BECK, J.:—The plaintiff sues for $373.76, the freight charges upon goods shipped by the International Harvester Co. at Hamilton, Ontario, to the defendant at Innisfail, Alberta, in April, 1911.

The "way-bill" stated the freight charges to be $373.76 and indicated in the proper column that the sum was to be collected. On the arrival of the goods and the way bill, the agent at Innisfail, following the usual custom, made out an "expense bill." In doing so, he, by mistake, noted in the appropriate column that the freight had been prepaid. A drayman, in whose favour the railway company had a standing order authorising him to receive all goods shipped to the defendant, received the goods in question and receipted for them on the 27th April, 1911, and delivered them to the defendant. According to the usual custom, the defendant as consignee, would receive a copy of the expense bill and apparently they did receive such a copy either directly or through the draymen.

This is virtually everything of substantial importance established at the conclusion of the plaintiff's case. I think the plaintiff had made out no case against the defendant.

The evidence brought out during the case for the defence shewed some additional facts.

The defendants were "agents for the International Harvester Company." They were "just agents—holding them" (the goods) "as factors." The custom between the company and the agents appears to have been that the agents were expected to pay the freight. If they felt unable to do so, they would telegraph the company to that effect and the company would pay the freight charging the agents a straight five per cent. on the amount of the freight for doing so. The amount of the freight would be taken into account between the company and the agents on settlement between them whether the particular goods had actually been sold or not. A settlement—but not a final settlement—was arrived at between the company and the agents in the fall of 1911; a final settlement in the spring of 1913. The defendants did not act as agents or otherwise for the company during the selling season of 1912; they did so in 1913 but not since. The evidence does not shew how the item of freight in question was treated in the account relating to the settlement. I should suppose that neither having paid it, it did not appear in these accounts at all. On the occa-

sion of the settlement in the spring of 1912, the company took over the goods, or such of them as remained on hand, comprised in the shipment in respect of which the claim for freight is now made.

I do not think that anything said by witnesses on behalf of the defendant assists the plaintiff's case. I think that the International Harvester Company is clearly liable for the amount of the freight in question, but that the defendants are not.

After examining a number of authorities I find that the law applicable to the case is succinctly stated in 26 Halsbury's Laws of England, tit: "Shipping & Navigation," pp. 291 et seq. "The person who is primarily liable for the payment of freight is the shipper of the goods. His liability exists independently of any charter party or bill of lading. Since in the absence of anything to shew the contrary a contract to pay freight is to be implied from the mere fact that he has placed the goods upon another's ship for the purpose of being carried to their destination. It is therefore unnecessary to take into consideration the actual ownership of the goods. The shipper is equally liable to pay freight although he never owned the goods at all but shipped them solely on behalf of a third person unless the facts of the case shewed that he acted to the knowledge of the ship-owners as agent only, in which case the person on whose behalf he acted is in reality the shipper and liable for the freight accordingly. (Sec. 400).

"Nor is his" (the shipper's) "liability taken away by the insertion of a term in the bill of lading expressly providing for payment of the freight by the person who takes delivery of the goods. Such a term is inserted for the benefit of the ship-owner, who is thereby entitled to withhold delivery until payment; it is not intended to exonerate the shipper from liability. Its effect is merely to give the ship-owner an option to demand from the person to whom he delivers the goods. He is not as against the shippers, bound to exercise his option and the shipper remains liable, notwithstanding that the shipowner has delivered the goods without demanding payment of the freight from the consignee." (Sec. 401.)

"The consignee is not liable, as such, to pay freight since he is not a party to the contract of carriage. Where there is a bill of lading in which he is named as consignee,

or which has been endorsed to him, he is by statute (Bills of Lading Act, 1855, 18 & 19 Vic. ch. 111, Imp.) expressly made liable to pay freight as if he were a party to the contract contained in the bill of lading, provided that the property in the goods has passed to him. His statutory liability, however, depends upon his ownership of the goods and does not arise where, though he is named as consignee in the bill of lading or where he becomes endorsee thereof, the property in the goods does not pass to him thereby. Such a consignee is an agent, whose duty it is to take delivery on behalf of the owner of the goods. Since, however, the shipowner has a right to withhold delivery until the freight has been paid, the receipt of the goods by the consignee in such a case, though it does not itself create any obligation to pay freight, may amount to evidence of a new contract of carriage, whereby the consignee, in consideration of the shipowner giving up his lien, agrees to pay the freight. Whether this new contract exists or not is a question of fact to be determined by reference to the circumstances of the particular case. The conduct of the consignee and in particular his previous dealings with the shipowners and perhaps his usual course of business must be such as to lead to the inference that his receipt of the goods was in pursuance of the new contract and not merely in discharge of his duty to his principal. Though the receipt of the goods may, in the absence of any explanation, be sufficient, no such inference is to be drawn where, at the time when the consignee received the goods, he was known by the shipowner to be acting as agent for the owner and the delivery was made to him in that capacity." (Sec. 404).

One of the older cases to which reference may be made is Domett v. Beckford (1833), 5 Barn & Adel., 521; 39 R. R. 559.

The defendants are not shewn to have been the purchasers of the goods or otherwise the owners of them. The evidence is to the contrary. It appears too that the defendants, by reason of the plaintiffs' mistake, supposed that the freight charges had been prepaid. There could therefore have been no intention on the part of either the railway company or the defendants which could properly found any inference that the defendants were, by receiving the goods, undertaking a liability to pay the freight or that the railway company was consciously releasing their lien. There

is no evidence beyond what I have noted on which to ground any new contract on the part of the defendants either express or implied.

In the Court below the judgment was given for the plaintiff. For the reasons I have indicated I think the appeal should be allowed with costs and judgment entered dismissing the action with costs.

SCOTT, STUART, and SIMMONS, JJ., concurred in the result.

Appeal allowed.

ALBERTA.

STUART, J. DECEMBER 7TH, 1914.

CHAMBERS.

GREAT WEST PERMANENT LOAN CO. v. JONES.

Mortgage—Foreclosure—Whole Amount of Mortgage Not Due — Form of Order Nisi — Sale Free From Encumbrances or Subject to Mortgage—Discretionary Power of Court.

In foreclosure proceedings by a mortgagee where the whole amount of the mortgage is not due the mortgagee is not entitled as a matter of right to an order nisi directing that upon default in payment of the amount found to be due the property shall be sold subject to the amounts which will not have accrued due upon the mortgage at the date of sale. The Court may order a sale free from encumbrances or in its discretion when settling the conditions direct the sale to be subject to the mortgage.

Bovill v. *Endle*, [1896] 1 Ch. 648, referred to.

Application by plaintiff for an order nisi in foreclosure proceedings.

George H. Ross, K.C., for plaintiff.

A. B. Mackay, for defendant.

STUART, J.:—This is an application by a plaintiff mortgagee in foreclosure proceedings for the usual order nisi. The whole amount of the mortgage is not yet due and the plaintiff brought its action merely upon a default in payment of an instalment.

The contest is over the point whether or not the order should direct that, upon failure to pay the amount found due within the time limited, the property should be sold subject to the amounts which will not have accrued due upon the mortgage at the date of the sale. The plaintiff contends that it has a right to ask that only the amount then due for principal, interest and costs be realized and that the purchaser at the sale be asked to assume the balance yet to accrue upon the mortgage. The alternative is that the Court might order the whole property to be sold and the plaintiff thus forced to accept in full its principal accrued interest and costs.

It is important to observe that it is not a question of what the conditions of sale ought to be in the particular case because though the Court might have the power against the wish of the plaintiff to order a sale on such terms as would force it to accept its full principal, interest and costs it does not follow that it might not appear more beneficial to both parties that such a sale as the plaintiff insists upon should be directed. The point raised is: Can the plaintiff insist on such a sale or can the Court force upon the plaintiff a sale on such terms as will necessitate its accepting its money in full?

The mortgage contains an acceleration clause, but the plaintiff has not taken advantage of it, and is therefore not forced, for any such reason as appeared in Cruso v. Bond, 1 Ont. R. 384, to accept its full principal, interest and costs.

In Bell and Dunn on Mortgage at page 83 it is said: "Where, however, a mortgagee takes proceedings to enforce his security he cannot refuse to accept payment of the whole amount of principal and interest even although part of it has not yet matured. But if his proceedings are confined to protecting his security he cannot be compelled to accept payments of moneys not yet due as the right to accelerate payment for default is at the option of the mortgagee."

The cases cited as authority for this are unfortunately cases dealing with chattel mortgages; but in Ex parte Wickens, [1898] 1 Q. B. at p. 548, one of the cases cited, A. L. Smith, L.J., said: "It has been pointed out that where a mortgagee has entered into possession or taken other steps for the purpose of realizing his security the Court has jurisdiction upon payment of the debt, the interest then due, and the costs, to order the security to be given up."

The rule seems to be that this right accrues to the mortgagor where proceedings are taken to enforce the security before the whole amount has become due and that even entry into possession is a sufficient taking of proceedings to create the right in the mortgagor. Bovill v. Endle, [1896] 1 Ch. 648.

If this is so it must follow a fortiori that the Court may order a sale of the property free from the encumbrance.

It is clear that it is only right that a mortgagee should be subject to this rule. He has no power of sale himself. He is asking the Court to interfere, to put its hands upon the mortgagor's property and to sell it at public auction. Clearly he cannot ask the Court to split up his debt, to realize now a part of it out of the property and allow the remainder to stand against it although such a course might appear detrimental to the interests of the mortgagor. He is asking to have his security enforced. Then he must be content to take the money and all the money for which the security was given.

But it is still open to the Court in its discretion when fixing the conditions of sale if it appears to be the best course to pursue in the interest of the parties to order that the sale shall be subject to the mortgage. That is a question to be decided when the conditions of sale are fixed. The order for the present will be that upon default the property or a competent part thereof be sold under the direction of a Judge.

ALBERTA.

WALSH, J. DECEMBER 4TH, 1914.

TRIAL.

DANIELS v. THE IMPERIAL BANK OF CANADA.

Banks and Banking—Banker and Customer—Relations—Right to Combine Accounts—Trust Account—Right to Charge Cheque on Trust Account Against Private Account—Set-off.

Plaintiff had to his credit with defendant bank a private account of $1,544.35 and a trust account of $501.61. Plaintiff alone had the right to draw cheques on the trust account. A cheque for $750 on the trust account was presented, paid and debited to the private account. Both accounts were subsequently closed.

Plaintiff claimed to recover the sum of $750 on the ground that defendant bank had no right to charge this sum against his private account.

Held, that the relations of banker and customer being debtor and creditor, the banker has power to combine two private accounts and to consider the balance as the amount due to the customer.

Held, also, that a banker has no right to set off a balance to the credit of a customer as trustee against a debit in his private capacity.

Held, also, that the method adopted by the bank in this case was an improper one, inasmuch as the $501.61 to the credit of the trust account should have been exhausted and then the right of the bank to set off the over-draft of $248.39 on the trust account asserted against plaintiff.

Held, also, that plaintiff was personally liable to the defendant company on the trust account and that therefore defendant company was entitled to set off this liability against funds held to the plaintiff's personal credit.

Action to recover $750 amount of a cheque on plaintiff's trust account alleged to have been wrongfully charged against his private account.

F. W. Griffiths, for plaintiff.

James Short, K.C., and G. H. Ross, K.C., for defendant.

WALSH, J.:—The plaintiff, W. C. Daniels, in May of this year opened a deposit account with the defendant at its Calgary branch, the account being in the name of "W. C. Daniels, in trust." He was the managing director of the Aetna Investment Trust Company and this account was opened by him for the carrying on through it of his banking business as such managing director. He says that when he

opened this account, he explained these facts to the defendant's manager and this is not denied. In June he opened a deposit account of his own at the same office and there was on the 12th of June to his credit in this account the sum of $1,544.35. On this day a deposit of $1,174.57 was made to the credit of the trust account, making the amount then to the credit of that account $1,338.61, as shewn by the ledger although as a matter of fact the real credit balance was but $1,238.61. This deposit was made up in part of a cheque drawn by the plaintiff upon the trust account on the 10th of June in favour of one Hole, which had by subsequent endorsement found its way back to the plaintiff, who thus became the holder of his own cheque, which he deposited in this way to the credit of this trust account. The deposit of $1,174.57 was first entered in the ledger to the credit of the trust account and before the $750 cheque which formed a part of it reached the ledgerkeeper for entry to the debit of the same account. Another cheque drawn against it for $737 had been charged up and the real credit balance of $1,238.61 had been thereby reduced to $501.61, so that there were not sufficient funds to the credit of the account for the payment of the $750 cheque. The ledgerkeeper, thereupon, without any notice to or consent of the plaintiff, charged it up against the plaintiff's personal account, thereby reducing the amount to the credit of that account to the sum of $794.35. This balance was subsequently withdrawn by the plaintiff and the account closed. No one but the plaintiff had authority to sign cheques drawn against the trust account. The cheque in question and the $737 cheque above referred to were signed by him. The trust account has also since been closed. The plaintiff sues now to recover the above sum of $750 which he claims the defendant still owes him as it had no right to charge the trust cheque for that amount against his private account. The relation between a bank and its customer is primarily that of debtor and creditor. This was settled as long ago as 1848 by the House of Lords in Foley v. Hill, 2 H. L. C. p. 28. The bank becomes a debtor to the customer for sums which pass to the credit of his current account. The property in the money so deposited passes to the bank and the customer's right is to have repayment of the debt thus created upon demand. If the customer has two or more accounts in his own right with the same bank, it is undoubtedly entitled in the absence of agreement to the contrary to combine them and to

consider the balance resulting from this combination as the amount really owing from the one to the other. If, however, one of the accounts in the customer's name is to the knowledge of the bank a trust account, the right to combine it with the customer's personal account does not exist in the bank. In other words, there is no right to set off against a balance standing to the credit of the customer as a trustee a sum standing to his debit in his private capacity. Abundant authority for these propositions is to be found in such cases as Bailey v. Finch, L. R. 7 Q. B. 34, Ex parte Morier, 12 Ch. D. 491, Garnett v. McKewan, L. R. 8 Ex. 10, Buckingham v. London, &c., 12 T. L. R. 70, Union Bank of Australia v. Murray-Aynsley, [1898] A. C. 693, Greenwood v. Williams, 11 T. L. R. 56, Ex parte Adair, 24 L. T. R. 198, &c.

If, therefore, these two accounts had been the plaintiff's in his own right no question could have arisen as to the right of the defendant to combine them for the purpose of striking a balance and thus covering the overdraft created by this cheque in the account against which it was drawn. Neither is there any doubt that if the cheque in question had been drawn against the plaintiff's private account creating an overdraft in it, the defendant would have had no right to combine that account with the trust account so that the balance to the credit of the latter account might have been available to wipe out the overdraft in the personal account. The facts, however, do not bring the case within either of these propositions but constitute rather the converse of them.

Sir John Paget in the second edition of his work on the law of banking, says at p. 307: "Either by right of lien or set-off, a banker appears entitled to retain a credit balance on a purely private account against overdraft on any other account for which the customer is personally liable, though by reason of being earmarked or even fiduciary, the latter account is exempt from lien or combination. Reasonable notice, must, of course, be given before so doing and cheques previously drawn must be honoured."

No authority is given for this proposition nor have I been able to find any. In fact after a careful reading of the authorities I have been unable to find the report of any case in which a condition created by facts of the character of those which are in evidence here has been under consider-

ation. I am of the opinion that the defendant had not the right to do what it did in the way in which it did it. I cannot understand upon what principle it acted in charging up against one account a cheque drawn against an entirely differet account. Its proper course, I think, was to have debited the trust account with the amount of this cheque and then asserted its right to payment of the overdraft by the plaintiff. There was to the credit of the trust account $501.61, which could, in this manner, have been applied on this $750 cheque, leaving but $248.39 of an overdraft for which the defendant might have tried to hold the plaintiff liable. This, however, is perhaps but a matter of bookkeeping for in practice it would have been worked out just as it has under the plan adopted by the defendant. If the plaintiff would have been liable to the defendant under the plan above suggested for the above sum of $248.39, he would in addition have been liable to it for the amounts subsequently charged against the trust account, the net amount of which was $501.01, making in all a liability for this same sum of $750, though this liability would have been in a different form and created by a different method than that adopted by the defendant.

It comes down in my judgment to the question: Was the plaintiff personally liable to the defendant for the indebtedness of the trust account to it whether that indebtedness was represented by this cheque for $750 or by the overdraft of $248.39, and the subsequent debits as I have worked them out. If he was, the defendant has the right to set off that liability against the balance of $750, which without the charging up of this cheque the defendant undoubtedly owed him. In other words, even if the defendant had not the right to combine the accounts for the purpose of working out in that way the plaintiff's liability of $750, it would have the right to say that while it owed the plaintiff $650 on his private account, he owed it $750 on the other account and his right to set that off against his claim would not be disputed. Was he then liable to the defendant in respect of the undoubted indebtedness to the defendant on trust account?

I am of the opinion that he was. He was the customer of the bank in respect of the transactions carried on through the medium of the trust account. It was with him alone and in and on his name that the defendant was dealing. It was

by his hand alone that the cheques drawn on this account were signed. It was his act which created the indebtedness of the trust account to the defendant. The cheque for $750 in the hands of a holder other than the bank would undoubtedly have involved the plaintiff in liability to such holder if there were not funds to the credit of the account for its payment, for the words "in trust" written after his signature would not have relieved him from the personal liability otherwise attaching to him as drawer of the cheque. And being of this opinion, I must hold that while the defendant owed the plaintiff on his current account this sum of $750, he owes the defendant $750 on trust account, which it is entitled to set off, and I must dismiss this action, which I do with costs.

ALBERTA.

STUART, J. DECEMBER 8TH, 1914.

CHAMBERS.

IN RE WESTERN CANADIAN FIRE INSURANCE CO., JOHN CRAIG'S CASE AND JESSIE CRAIG'S CASE.

Company—Issue of Shares—Irregularities—Liabilities of Contributories—Who Are.

The fact that a company begins to do business before it is legally entitled to do so, does not relieve contributories in the winding-up proceedings.

Persons who agree to take shares in a company are contributories and liable as such in winding-up proceedings.

A. L. Smith, for the company.

D. J. Broomfield, for the Craigs.

H. D. Mann, for contributories.

STUART, J.:—In view of the principles laid down in Lindley's Law of Companies, vol. 2 at pp. 1066 and 1067, and in the cases there cited, particularly Challing's case and Hare's case, I think a good deal of the argument which was presented to me on behalf of the Craigs is really irrelevant. It must be remembered that the company which is

now in liquidation is the company which was incorporated by the Provincial Statutes, viz.: Chapter 24 of the Statutes of 1910, second session. There can be no doubt as to the validity of that statute and therefore no doubt of the legal and effectual incorporation of the company which is now in liquidation. There can be no doubt that the company was entitled to make an issue of shares. There can also be no doubt that in respect of any shares issued by that company, there is no possibility of having any recourse to the provisions of the Companies' Ordinance with a view to questioning the propriety of the proceedings. By the statute in question, only certain specified provisions of the Companies Ordinance are made applicable to this company and these provisions relate entirely to the question of inspection by the Lieutenant-Governor in Council. This statute contains a large number of provisions relating to the method of organizing and carrying on the business of the company, many of which are quite inconsistent with the provisions of the Companies' Ordinance. In my opinion, therefore, if it can be found that there has been made an agreement between the company incorporated by the statute and which is now in liquidation and an alleged contributory that the latter should take shares in the company, there can be nothing more to be said. No authorities were quoted to me to uphold the contention that merely because the company may have begun to do business before it was legally entitled to do so, therefore, persons who have made agreements to take shares in the company may be relieved and struck off the list of contributories in the winding-up proceedings. It would be strange, indeed, if, merely because the company had commenced to do business before it was legally entitled to do so and in doing this business had incurred obligations, these creditors should be prevented from looking to the persons who had subscribed for the shares in the company to get satisfaction of their claim.

The only questions therefore so far as the present alleged contributory is concerned is this: Did they make an agreement to take shares in the company? With respect to the bulk of the shares in question, it appears to me quite unnecessary to go back of the shares register and the share certificates. It is admitted that on the 15th of March, 1911, John Craig made application for one hundred and five shares in the present company. Apparently this application

was made on behalf of Jessie Craig, but however that may be, Mrs. Craig does not deny that on the 10th of April, 1911, share certificates were issued to her for one hundred shares and that she had retained them ever since. She made no repudiation of them and only now when the company is in liquidation, does she make any attempt to repudiate the ownership of them. In my opinion those shares must be treated as being really in existence and in the circumstances Mrs. Craig must be held to at least having impliedly agreed to take them because of her receipt of the share certificates, and her omission to reject or to return them in any way.

Then with respect to John Craig, I think the same may be said, at least, regarding the one hundred shares. It is true that certificates for only eight shares are produced as having come from his possession, but it appeared in the evidence, at least, that is the inference which I think must be made from what is stated, that an additional certificate for twenty shares had been issued to him, that he had transferred these to Brown, but the transfer had not been registered. I think, therefore, it must be assumed that John Craig did receive share certificates for one hundred shares in the company and I think it must be, therefore, held that he impliedly at least agreed to take these one hundred shares. He never repudiated the issue to him of these shares, but retained these certificates.

With regard to the remaining ten shares, there seems to be a little obscurity as to the exact position.

The situation is this: there had been a previous company incorporated under the company's ordinance, called the Western Canadian Fire Insurance Co., Ltd. John Craig had applied for one hundred and five shares in that company of $100 each and he had apparently paid in cash one half of the amount and had given a mortgage and some notes or a note for the balance. The statute incorporating the present company provided for a merger, by means of certain procedure, of the old company with the company now in liquidation. The application to the new company of the 15th of March, 1911, for one hundred and five shares was made by John Craig, apparently for the purpose of getting his wife, Jessie Craig, an equal amount of stock in the amalgamated company to that already held by him and that application contains upon it the following clause: "and I hereby assign one half the amount paid on my present hold-

ings in payment." The idea apparently was that he and his wife should each hold the same amount of stock in the present company and that the payments made by him on the old stock should be divided and one half of it be allocated to the new stock. For some reason or other, which was not very clearly explained, Mrs. Craig was only allotted one hundred shares in the present company and certificates for only that number were issued to her, while John Craig was entered in the share register of the new company for one hundred and ten shares, with respect to which the sum of $5,500 was stated to have been paid. Upon the whole, I think that the proper inference to draw is that Mrs. Craig must be taken to have agreed to take one hundred and five shares in the present company. It was admitted that John Craig made the application on the 15th of March, 1911, on her behalf, and as the present company had really taken over all the assets of the old company, it seems to me that they must be treated as having agreed to the appropriation of one half the amount previously paid by Craig himself on his shares and as a partial payment upon the shares given Mrs. Craig. Mrs. Craig is entered on the share register of the present company for one hundred shares and $5,000 is expressed as having been paid. I think the proper disposition of the matter is to direct a rectification of the share register so that Mrs. Craig will appear as the holder of one hundred and five shares and John Craig will also appear as the holder of one hundred and five shares. Neither John Craig nor Mrs. Craig gave any evidence and in the absence of any explanation or objections from them, I think that I am entitled on such evidence as I have to make the inference that Craig did agree to take not only one hundred shares in the new company, but one hundred and five shares. He was a director of the company, or, at least, acted as such, and I think that I have enough evidence before me to justify the inference that what was done was done with his knowledge and consent, and he must therefore be taken to have agreed to it. The exact amount which should be treated as having paid on these shares is not explained, but it appears in the share register that $5,500 has been paid on John Craig's one hundred and ten shares and $5,000 for Mrs. Craig's one hundred shares. I think this has probably arisen from some misapprehension and the $500 should be divided and that John Craig should be credited with $5,250

and Mrs. Craig with the same amount. This would leave the liquidator open to proceed upon the securities given by John Craig in respect of the amount unpaid upon the original one hundred and five shares.

One argument addressed to me was that Mrs. Craig got no consideration for her one hundred and five shares because the assets of the old company had not been transferred to the present company in the way provided by the statute, but it was not disputed that the present company was in possession and control and enjoying all the assets of the old company, whatever they were, and I cannot see that this objection can be upheld.

I refer especially to Hare's Case, L. R. 4 Ch. 503, and Challis's Case, L. R. 6 Ch. 266. With respect to Stace & Worth's Case, L. R. 4 Ch. 682, it is to be observed that the agreement which was necessary to sustain the amalgamation there in question was held to be wholly void. That case does not touch upon the present circumstances; we have here, as I pointed out, a company validly incorporated and entitled to issue shares in which I have held that Craig has agreed to take one hundred and five shares and Mrs. Craig also has agreed to take the same amount. In this view of the case any illegality on the merger cannot be material in so far as the present proceeding is concerned. It might be material if the shareholders were to ask the liquidators to dispute the liability of the present company on the debts of the old company on the ground that the merger had not been properly carried out, but that question is not now before me.

In view of what I said in the beginning, the question of the prospectus is not material at all. There is no provision in the present statute requiring a prospectus of the present company to be issued. In as much as it was intimated to me that in the course of the liquidation and with respect to other contributories, some questions of misrepresentation would be likely to arise, I would suggest that counsel intending to raise this objection should consider very carefully the decisions in Oakes v. Turquand, L. R. 2 H. L. 325, Kempt v. Freehold Land & Brick Making Co., L. R. 3 Ch. (C.A.) 493.

I think the Craigs should also pay the liquidator's costs of the hearing of their cases.

ALBERTA.

STUART, J. NOVEMBER 17TH, 1914.

TRIAL.

WOLVERTON v. BLACK DIAMOND OIL FIELDS LTD. AND THE COALINGA SYNDICATE.

Company — Shares — Contract — Damages — Company's Refusal to Transfer Shares — Measure of Damages — Binding Contract to Purchase—Costs.

The Coalinga Syndicate was composed of three directors of the company and the wife of one of them. The Syndicate were owners of a fund of 250,000 shares of $1 each in the company out of which 10,000 shares were issued to plaintiff in consideration of agreeing to become a director in the company. He subsequently decided not to become a director and returned the 10,000 to Buck, one of the Syndicate, who handed him 2,000 shares back in consideration of services. Plaintiff subsequently had a purchaser for 1,000 of these shares. The company then demanded the 2,000 back and instructed their agents, The Trusts and Guarantee Company Limited, not to register the transfer of any of the 2,000 shares on the ground that he had obtained them by fraud, *i.e.*, on the representation that he would become a director of the company. The company alleged that the shares belonged to the Coalinga Syndicate.

Action for a declaration as to the ownership of the shares and for damages.

Held, on the evidence that the shares were the property of plaintiff.

Held, that he was entitled to damages against the company for its refusal to permit the transfer to the extent of $1,350, being the difference between the purchase price of the sale thus blocked and the price of the shares at the date of the action.

Held, that it was immaterial that there was no binding contract between plaintiff and purchaser.

Where added defendants actively defended an action costs were given against them, as well as against the defendant.

An action brought for a declaration as to the ownership of shares and for damages against a company refusing to register transfer.

C. T. Jones, K.C., for plaintiff.

A. A. McGillivray, for defendant.

WALSH, J.:—I am satisfied that the plaintiff's version of the facts is the true one. All of the witnesses who spoke of the events upon which the plaintiff's right to the shares in question hinges are interested in the outcome of this litigation. As between the plaintiff and the defendants' equally

interested witness, Buck, the evidence of the former impressed me much the more favourably. Miss Earl, an equally interested witness of the defendant, did not in my judgment add much by her evidence to the strength of the defence. It lacked certainty and precision. The story she tells of the plaintiff's intention as expressed to her of returning the shares certificate might as well relate to a time, as he says it does, before he returned the other certificate as to a date later than that. Her evidence upon this point on re-examination did not remove the impression created upon my mind by her cross-examination that she was unable to say with certainty whether this conversation took place before or after the occasion when the plaintiff alleges that the gift was made. The facts outside of these sworn to by these witnesses strongly support the plaintiff's contention. The certificate for the 8,000 shares was cancelled by resolution of the directors of the defendant company and the plaintiff was by another resolution of the directors entered in the register as owner of the shares in question. These resolutions were passed some months after the plaintiff had returned the certificate for the 8,000 shares and had been given, as he claims, the other 2,000 shares. It may perhaps be that the last mentioned resolution was passed, as Buck says it was, to have the record of its shares complete and to have some irregularities in the conduct of the company's business in this respect cured, but I am satisfied that if the facts with respect to these 2,000 shares had been as Buck now says they were, a very different resolution from that which was passed would appear on the books of the company. Three out of the four members of the syndicate were directors of the company and they all took part in the passing of the above mentioned resolution. The other member of the syndicate is the wife of the defendant Buck. Upon these facts I do not see how any question can arise as to the right of the defendant Buck as manager of the syndicate to give these shares to the plaintiff although it is quite true that the plaintiff realized that he should return these certificates to the syndicate when he decided not to become a director of the defendant company, it is equally true that he had done more work for the company in connection with its properties, work which the witness Kipling described as being of great value and there was nothing unreasonable in the gift of these shares which then had, I fancy, but little, if any, market value. I find therefore that

the plaintiff was the owner of these shares in April, 1914, when he was refused the right to transfer them and he is entitled to judgment accordingly.

I think the defendant company is liable to him in damages to the amount of $1,350 for its wrongful refusal to permit the transfer of 1,000 of these shares to a purchaser, being the difference between the purchase-price on the sale thus blocked and the present market value of these shares. The evidence satisfies me that a sale of 1,000 shares at a net price to the plaintiff of $1,500 was prevented by the wrongful act of the defendant company in refusing to record the transfer of them in its books. It is true that there was no binding contract for their purchase, but the purchaser was at the transfer office pursuant to an appointment made for the purpose of closing the deal and I am satisfied that it was not consummated only because of the act of the company's agent acting upon the instructions of its directors in preventing it.

The plaintiff is entitled to his costs. The members of the syndicate were added, I suppose, in order that the dispute between them and the plaintiff as to the ownership of these shares might be determined in this action. They have actively defended it. The personnel of the syndicate and of the company's directorate is practically the same and the company's refusal was doubtless negotiated by the syndicate. I think the plaintiff's judgment for costs should be against the added defendants as well as the company.

ALBERTA.

HYNDMAN, J. DECEMBER 2ND, 1914.

TRIAL.

ALBERTA DRILLING CO. LTD. v. DOME OIL CO. LTD.

Contract—Company—Drilling Contract—Covenant to Place Equipment on Site Free of Debt, Lien or Encumbrance—Power to Seize Equipment—Notice of Seizure—Independent Covenant—Waiver—Substantial Performance—Sections 63 and 63a Companies Ordinance—Oil a Mineral—Ultra Vires.

Plaintiff contracted to drill two oil wells for defendant, payment for the first well to be made as follows: $5,000 upon the execution of the agreement and $5,000 when the equipment was on the ground, such payment to be considered as an advance on account of the drilling. The first $5,000 was paid. Defendant had the right to stop the drilling whereupon it was to pay plaintiff a minimum of $10,000 for each well so stopped. The contract also empowered defendant to seize the equipment and complete the well if plaintiff failed in the substantial performance of any agreement therein, and plaintiff covenanted to place its equipment on the ground free of debt, lien or encumbrance. The equipment was placed on the ground free of any lien or encumbrance, but defendant knew that it had not been fully paid for and permitted plaintiff to drill for a fortnight when it seized the equipment and served a notice on plaintiff that it would complete the work.

The reasons alleged at the trial for the seizure were that the machinery was not paid for, that the workmen had complained of not being paid and that the work was not proceeding satisfactorily.

Held, that the reason alleged as to the machinery not being paid for was not the real reason for the seizure; that in the circumstances it was wrongful but was equivalent to a notice to cease boring, which entitled plaintiff to $10,000 less the $5,000 already paid; that as the second well had not been commenced and for other reasons no claim could be made as to that.

Held, also, that the covenant to place the equipment on the ground free of debt, &c., was an independent covenant and had been waived by defendant's actions.

Held, that as no time for commencing operations was mentioned a reasonable time was intended.

Held, also, that defendant should have given plaintiff a notice pointing out specifically its default and giving it a fixed and reasonable time to remedy same.

Held, also, that oil is a mineral and plaintiff being properly incorporated under sections 63 and 63a of the Companies Ordinance the contract was not *ultra vires* of plaintiff.

Action by plaintiff to recover a sum of $5,000 payable under a drilling contract when the drilling equipment to be provided by plaintiff was on the drilling site, and damages for its wrongful seizure by defendant.

A. H. Clarke, K.C., and H. J. Maber, for plaintiff.

Clifford T. Jones, K.C., and G. H. Ross, K.C., for defendant.

HYNDMAN, J.:—The plaintiff and defendant are both incorporated under the Companies' Act with non-personal liability under the provisions of secs. 63 and 63a of the said Act. The defendant company being the holder of certain oil claims in this province entered into an agreement, exhibit "1," with the plaintiff company on the 6th of July, 1914, and it was agreed that the pliantiff company would drill two wells on the defendant's holdings at such places as might be selected by defendants each to a total depth of 2,500 feet at the price of $8.50 per foot and 500 feet further if requested by defendants at the price of $10 per foot. Payments in respect of the first well were to be made as follows: $5,000 upon the execution of the agreement and $5,000 when the equipment was on the ground, such payment to be considered as an advance on account of the drilling. It was provided as to payment that 75 per cent. of the amount due for footage should be payable to the plaintiff for each 500 feet at the defendant's office in Calgary, but that nothing should be paid until the amount earned should exceed $10,000 above mentioned. The 25 per cent. to be payable on the completion of the work in a manner satisfactory to the company. The second well was to be paid for at the rate of 75 per cent. of the cost of footage drilled on completion of every 500 feet and balance on completion of well, approved and accepted by the company, provided always in case of each well that in the event of the company requesting the contractor to stop drilling, which the company may do at any time in its sole discretion, before a depth of 2,500 feet has been reached, that the company will pay the contractor a minimum of $10,000 for the drilling of each well so stopped. The defendant company was to furnish the derrick, standard rig and rig irons completely erected according to specifications of the contractor, and it was admitted at the trial that the defendant did not furnish everything as called for by the agreement and that the plaintiff, at defendant's request, completed the derrick, and that the plaintiff was entitled to charge and be given credit for the sum of $142.50 on this account. This, therefore, disposes of paragraph 3 of the statement of claim.

The first $5,000 was paid prior to the date of the agreement, leaving $5,000 to be paid when machinery was on the ground.

No particular time was stated in the document for the commencement of operations, so it must be assumed that a

reasonable time was intended. There is no doubt, from the evidence, the defendants were most anxious to have the work proceeded with as quickly as possible. It was, however, their duty to complete the derrick, which was absolutely necessary before the drilling could begin. They left plaintiffs to finish this and according to the evidence the derrick was completed between the 23rd of July and 6th or 7th of August, and from this time until about the 21st of August drilling was continued with interruptions of one kind and another intervening from time to time partly due to the fact that the plaintiffs' machinery was not as complete as it should have been. However, as the derrick, etc., was to be completed by the defendants and drilling could not be begun before it was ready, I think it is only proper to conclude that no delay can be charged against plaintiffs until the 6th or 7th of August, when the derrick was in order. Between this time and the 21st of August there were various complaints by the defendants on account of delay and it seems that the sand and gravel formation through which they were boring was largely the cause. It was found to be caving in and the casing was necessary to prevent its continuing to do so. Under the agreement defendant was to supply this and very soon after they were notified of its necessity they furnished it, but even after this things do not seem to have prospered to the satisfaction of the defendants, and on the 21st of August, Phillips, the managing director, served a notice on plaintiffs the material part of which is as follows:—

"Take notice that as authorised by a certain agreement dated the 6th day of July, 1914, between the Dome Oil Company Ltd., non-personal liability, and the Alberta Drilling Company Ltd., non-personal liability, and in respect of the failure of the said Alberta Drilling Company Ltd., to implement the said contract I have this day seized the following drilling equipment, etc., . . . the property of the said Alberta Drilling Company Ltd. . . . and further take notice that the Dome Oil Company Ltd., non-personal liability, will complete the work in terms of the said contract."

Clause (10) of the agreement reads in part as follows:—

"It is further agreed and understood that if the contractor abandons the work before the completion of either well to the depth of 2,500 feet that, as provided for in this contract, or fails in any respect in the substantial performance of any of the agreements herein contained the company shall have

the right forthwith and without notice by any officer or agent of the company to seize the drilling equipment material, tools and appliances owned by the contractor at the well site and to complete the well. In such event any costs to the company above the submitted prices per foot shall be charged against the contractor, and profits made by the company shall be paid to the contractor. But it is expressly provided that nothing in this clause shall allow the company to seize the drilling equipment of the contractor for any delay caused or indirectly caused by the company, its agents, or servants, and the contractor hereby covenants and agrees with the company to place their equipment, materials, tools and appliances on the ground free of debt and of all and every lien or encumbrance and so to keep and maintain said equipment, etc., etc., until the completion of this contract, and not to sell the same until this contract has been performed in every respect by the contractor. . . ."

At this stage the contractor had drilled only about 50 feet, which was, according to the evidence, a poor result.

Phillips' evidence is contradictory and unsatisfactory as to the real reason for seizure. At one time he says it was because the machinery was not fully paid for. At another time he says the two reasons for it were the complaint of drillers not receiving their pay, and that the work was not proceeding satisfactorily. The drillers deny that they complained, as their pay at that time was not due. Now it is clear from the evidence that the company had all along been aware of the fact that the machinery had not been paid for. Janse, who is a director of the defendant company, is also a half owner in the Carey company, which sold the machinery to plaintiff and to whom the debt was owing. Notwithstanding this knowledge on defendants' part they allow the plaintiff to proceed and after seizure use the same machinery themselves. They raised no protests at these dates that the debt was not paid, and the notice does not mention that this was a cause. My opinion is, that this condition was waived by the actions of the defendants and in any event I hold that this was not the real reason for the seizure. I think they considered that the plaintiffs were not proceeding with as much dispatch and in such a workmanlike manner as they had an idea they should. However, as no particular time was mentioned in the agreement it must be assumed that a reasonable time was intended. I am of opinion that the defendants acted precipitately in the matter, and instead of

seizing as they did should have given the plaintiffs a notice, either verbal or in writing, pointing out specifically their default, and giving them a fixed and reasonable time in which to remedy their position. It was hardly fair to the plaintiffs under the circumstances to have their machinery seized and the work taken out of their hands so abruptly, giving them no opportunity to perform their contract.

I am of opinion too that the covenant to place the machinery on the ground free of debt, etc., is an independent covenant. The contract says that the second $5,000 shall be paid when machinery is on the ground. As a matter of fact there was no evidence that there was any lien or encumbrance against the goods, but that there was a balance owing of $4,045.

Some evidence was given at the trial that the $10,000 was agreed to be spent in payment for the machinery, but this is not provided for in the written contract, which must govern.

Phillips states that a reason why he did not pay the $5,000 was because the money was assigned to the Bank of Commerce. It was shewn at the trial that the amounts owing by plaintiff to the Bank of Commerce was $1,090 and $4,045 to the Carey Company for balance on machinery, and that the $5,000 along with $142.50 was sufficient to liquidate these amounts.

In order to satisfy defendants of their intentions with regard to these debts the plaintiffs signed orders directing defendants to pay their claims out of the money due them. When the accountant of the plaintiffs presented these to Phillips he put him off—telling him he would have to see his solicitors and stating it could not be fixed up till "Saturday morning." The next thing plaintiffs heard was that the machinery had been seized and the work stopped so far as they were concerned. If defendants had accepted and paid these orders they would have been fully protected against any breach by the plaintiffs of this covenant. I am of opinion on the whole evidence that the defendants had no right to act as they did under the circumstances.

As to the question of damages, however, there is some difficulty in arriving at a satisfactory amount. Under the contract the defendants undoubtedly had the right to notify the contractor to cease operations on either well at any time, and in that event they should be paid at the rate provided

according to the depth to which boring had progressed, but not less than $10,000 for each hole. As the second hole had never been commenced I do not think any claim can be made for damages as to that. In my view it was not intended that there should be any allowance unless work, to some extent, was commeneced on the second bore. The words of the contract on this point, clause (4), are:—

"Provided in the case of each well that, in the event of the company requesting the contractor to 'stop drilling,' which the company may do at any time in its sole discretion before a depth of 2,500 feet is reached, that the company will pay the contractor a minimum of $10,000 for the drilling of each well so stopped."

Now the $10,000 which should have been paid at the time called for in the contract was to be applied on the footage drilled and at the rate of $8.50 per foot, $10,000 would answer for 1,176½ feet. Assuming for argument's sake that the plaintiff had gone to a depth of 1,176½ feet, and then received notice to cease boring, nothing more would have to be paid by defendants, as the $10,000 would cover this. The facts of the case are, however, that at most 50 feet was reached. This at $8.50 per foot would amount to $425, leaving $9,575 still unearned, but, under the terms of the contract, the eplaintiff is entitled to this amount. My view is that the action of the plaintiff amounts to a notice to cease boring which entitles plaintiff to a minimum of $10,000, from which must be deducted the $5,000 already paid. I cannot agree with the contention of plaintiffs that, in addition to the $5,000 still owing, it should also receive $10,000. I find, therefore, that the plaintiffs are entitled to be paid the said sum of $5,000 and that the seizure of the machinery was, under the circumstances, unwarranted. I do not think that the plaintiffs are entitled to very heavy damages by reason of the wrongful seizure of the machinery. If they had gone on boring to an extent which would exhaust $10,000 the machinery or tolls would be deteriorated considerably in value, and they still have them, after boring only a short distance. I therefore fix these damages at $250.

The defendants also pleaded that oil not being a mineral the plaintiff was not properly incorporated under secs. 63 and 63a of the Companies Ordinance, and, therefore, not entitled to enter into a contract such as the one sued on, and that it was ultra vires the company on this ground. I find,

however, under the authorities, that oil is a mineral, and the company might properly enter into such a contract.

There will, therefore, be judgment for the plaintiffs for the sum of $5,392.50 with costs, including the costs of the injunction.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

STANDARD CONSTRUCTION CO. v. CRABB.

Company—Power of Managing Director to bring Action in Name of Company—Authorization—Articles of Association—Implied Authority—Special Power—Delegation—Acquiescence—Right of Third Party to Question Validity of Managing Director's Action before Repudiation by Company—Costs—Solicitor Issuing Writ without Proper Authority Liable for—Evidence — Onus on Solicitor to shew Authority—Order Staying Proceedings.

The articles of association of a company provided that the officers should be a president and a general manager, a vice-president, and a secretary-treasurer; that the affairs of the company should be conducted by a board of directors, a majority of said directors to constitute a quorum. At a shareholders' meeting a managing-director was appointed.

Held, that the appointment did not confer upon the managing director any implied authority to bring an action in the name of the company, the office of managing-director not being recognized by the articles of association.

Held, that the said managing-director could not bring an action in the name of the company, since there was neither special power conferred upon him by the articles of association, nor delegation by the board of directors, nor acquiescence by the board or shareholders in the exercise by him of authority to initiate actions in the company's name.

Hopkins v. *Newspaper Proprietary Syndicate*, [1900], 2 Ch. 349; *Ho Tung* v. *Man On Insurance Co.*, [1902], A. C. 232: referred to.

Where a solicitor's right to issue a writ in the name of a company is questioned, the onus is on the said solicitor to shew his authority. It is not sufficient for the said solicitor to shew that the writ was issued on instructions from the managing-director, but he must also shew that the managing-director had authority to give the instructions, or that the board of directors ratified his action in so doing, or that the company's shareholders had so acquiesced therein as to bind the company.

Porter v. *Fraser* (1913), 29 T. L. R. 91, referred to.

Held, that the validity of the action of the said managing-director in giving instructions, could be questioned by a third party, even although the company had not repudiated the said action:

Morse v. *Durnford*, 13 Ch. D. 714; *Gerlinger* v. *Gibbs*, [1897], 1 Ch. 479: referred to.

Held, that the solicitors who issued the writ, and not the managing-director, must pay the costs of the defendant, as between party and party, as well as the costs of appeal, the solicitors having a right of action against the managing-director for the costs which they had reasonably been put to in the matter.

La Compagne de Magville v. *Whiteley*, [1906], 1 Ch. 788, distinguished.

An action for the recovery of money alleged to have been taken from the funds of the plaintiff company by defendant while secretary-treasurer. Upon the application of defendant the Local Master refused to make an order staying the proceedings in the action, and that the solicitors issuing the writ do pay the defendant's costs of the writ and of the application on the ground that the writ was issued without the authority of the plaintiff company.

An appeal from the order of NEWLANDS, J., in Chambers, reversing the order of the Local Master, and staying the proceedings in the action.

The appeal was heard by HAULTAIN, C.J., LAMONT, BROWN, and ELWOOD, JJ.

T. P. Morton, for plaintiff, appellant.

Stevenson, for defendant, respondent.

The judgment of the Court was delivered by

LAMONT, J.:—The plaintiff company was incorporated in April, 1911. The memorandum of association was signed by N. G. Boggs and J. P. O'Leary of Saskatoon, and A. J. Adamson of Winnipeg. From the date of the incorporation of the company until this action was brought the only shareholders in the company were the three persons above-mentioned. They were also the directors of the company. The articles of association provided that the officers of the company should be a president and general manager, a vice-president, and a secretary-treasurer. At the shareholders' meeting held June 28th, 1911, the following appointments were unanimously made: President, N. G. Boggs; Managing Director, J. P. O'Leary; Secretary, A. E. Venables. There was not, so far as the material before us shews, any delegation by the directors of the powers of the board of directors to any director beyond what is implied by his appointment to and acceptance of the office of president or managing director respectively. In June, 1914, the solicitors issued the

writ herein in the name of the company as plaintiffs, on the instructions of J. P. O'Leary, Managing Director. The claim against the defendant was for moneys alleged to have been taken from the funds of the company by the defendant while secretary-treasurer of the company. The defendant made an application to the Local Master for an order staying the proceedings in the action, and that the solicitors issuing the writ do pay the defendant's costs of the writ and of the application, on the ground that the writ was issued without the plaintiff's authority. The Local Master dismissed the application. On appeal in Chambers, my brother Newlands reversed the order of the Local Master and stayed proceedings in the action. From that decision this appeal is taken. The only question involved is, had J. P. O'Leary, as managing director, authority to instruct the solicitors to bring this action against the defendant in the name of the plaintiff company?

The articles of association provide that the affairs of the company shall be conducted by a board of three directors, and that a majority of the directors shall constitute a quorum. It required, therefore, the concurrence of two directors before the company could act in its corporate capacity. One director alone has no power prima facie to act on behalf of the company. He is only one of a body of directors in whom collectively the management is vested. Palmer's Company Law, 5th Ed., 167; Lindley on Companies, 6th Ed., pp. 205 and 206.

It was, however, argued that the appointment of O'Leary as managing director conferred upon him an implied authority to bring an action in the name of the company. As to this contention, it is to be observed that the office of managing director is not one recognized by the articles of association. Under the articles the office of president and managing director is one, and O'Leary was the first president and managing director. But for some reason which does not appear, the shareholders, at a meeting on June 28th, 1911, without amending the articles, appointed Mr. Boggs president and O'Leary managing director, and from that date Mr. O'Leary was styled "managing director." There is, however, no evidence as to what work he actually did as managing director, or whether he did any work at all. The company were engaged in extensive building operations, but whether Boggs or O'Leary was the person actually directing

the operations of the company does not appear. Assuming, however, that the shareholders did amend the articles by providing for a managing director, and assuming that O'Leary was properly appointed managing director, would that give him authority to bring this action in the name of the company? Under the circumstances of this case I am of opinion it would not. A managing director is only an ordinary director entrusted with some special powers. Hopkins v. The Newspaper Proprietary Syndicate, [1900] 2 Ch. 349. These special powers may be given him by the articles of association or by delegation from the board of directors. (Table A.-68), or perhaps by a course of conduct long acquiesced in by the shareholders: Ho Tung v. Man On Insurance Company, [1902] A. C. 232. Here the articles of association did not give the managing director any special powers. Nor has it been shewn that there was any delegation of authority by the board to O'Leary, nor any acquiescence either by the board or shareholders in the exercise by him of authority to institute actions in the company's name. O'Leary, therefore, had only the same authority as either of the other two directors, except, I take it, that as managing director de facto it would be his duty to carry out the instructions and the policy of the company as decided upon by the board. That he had no authority of his own motion to institute proceedings to collect accounts he well knew. He was present at a meeting of the board of directors on March 12th, 1913, at which the following resolution was passed:

"Outstanding accounts:—The secretary was instructed to use every reasonable effort for the collection of these, and in the event of failure to place them in the hands of our solicitors for this purpose."

This is the only record of any action in reference to the collecting of accounts appearing in the material before us. By this action of the board, to which he was a party, O'Leary knew that the placing of accounts in the hands of the solicitors for collection was not a matter left to him as managing director, but was delegated to the secretary-treasurer. His instituting proceedings was, therefore, an assumption of authority which he knew he did not possess.

When a solicitor's right to issue a writ in the name of a company as plaintiff is questioned, the onus is on the solicitor to shew his authority. It is not sufficient to set up that it was issued on instructions from the managing director; it

must be shewn as well that the managing director had authority to give the instructions or that the board of directors ratified his action in so doing, or that the company's shareholders had so acquiesced therein as to bind the company: Porter v. Fraser (1913), 29 T. L. R. 91. In this case Mr. Justice Neville, in delivering judgment, said it was important "that solicitors should be careful to act on the express instructions of their client, and to obtain a written retainer, before taking any steps in any litigation, although no doubt a parol retainer might do if it could be proved. In the present case there was no evidence in support of the suggestion that Mr. Dixon Davies had any authority to act for the applicants and to enter an appearance for them to the writ. There was no question of damage, but his action on behalf of the applicants was wholly unauthorised, and there must be an order in the terms asked for. He must pay the costs of the applicants as between solicitor and client, and the plaintiffs' costs of the application as between party and party." In the present case it has not been shewn that the solicitors had authority from the company, and, as intimated in the Court below, the material points strongly to the conclusion that O'Leary cannot obtain ratification for his action either by the directors or the shareholders.

It was, however, argued that the company had not repudiated the action of O'Leary in giving the instructions, and that no one else could question their validity. This contention received judicial consideration in Nurse v. Durnford, 13 Ch. 764, and in Geilinger v. Gibbs, [1897] 1 Ch. 479; and in both of those cases the defendant's right to make the application was upheld. I am, therefore, of opinion that the order staying proceedings was right, and should be affirmed.

The learned Judge in Chambers directed that the costs should be borne by O'Leary, on the authority of La Compagne de Magville v. Whiteley, [1896] 1 Ch. 788. With great deference, I think the facts of that case distinguish it from the present one. In that case there were two plaintiffs, and the remaining plaintiff, who was the one who had given the instructions, was ordered to pay the costs. Here, O'Leary is not a party to the action at all, and would, therefore, have no status to appeal against the order directing him to pay costs. In Fricker v. Grutton, [1896] 2 Ch. 662, the Court of Appeal in England dealt with this question, and held that

the costs should be payable by the solicitors, Rigby, L.J., saying:

"There must be a stay of the proceedings upon the orders made against Mr. Weller, and, Mr. Toppin having purported to act as his solicitor in the action without a proper authority, he must pay Mr. Weller his costs as between solicitor and client; and, having put forward Mr. Weller as one of the persons to pay the costs ordered to be paid by the plaintiffs, he must be substituted for Mr. Weller, and must pay the costs which Mr. Weller has been ordered to pay to the defendants."

The order of the learned Judge in Chambers staying proceedings in the action, should be affirmed, but the order as to costs should be varied by directing the solicitors to pay the costs of the defendant as between party and party as well as the costs of this appeal. This will probably work out in the end to the same result as that directed by the Chamber Judge, because the solicitors will have a right of action against O'Leary for all the costs they reasonably have been put to in the matter.

Order staying proceedings affirmed; order as to costs varied.

THE

Western Law Reporter

VOL. XXX. TORONTO, JAN. 18, 1915. No. 4

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

CAMERON v. ROYAL BANK OF CANADA.

Practice—Security for Costs—Time for Making Application —Requisites of Affidavit—Rules of Court.

An affidavit in support of an application for security for costs is sufficient if it states that defendant has a good defence upon the merits and that the deponent is informed and verily believes that plaintiff resides outside the Province.

***O. W. Kerr Co.* v. *Lowe*, 3 W. L. R. 400; *Balcovski* v. *Olsen*, 3 W. L. R. 367: followed.**

An application for security for costs may be made at any stage of the proceedings.

***Lydney and Wigpool Iron Ore Co.* v. *Bird*, 23 Ch. D. 358; *In re Smith*, 75 L. T. R. 46: followed.**

An appeal from the judgment of a district court judge refusing to make an order for security for costs.

The appeal was heard by HAULTAIN, C.J., NEWLANDS, and ELWOOD, JJ.

A. Frame, for defendant, appellant.

C. W. Hoffman, for plaintiff, respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—This was an application for security for costs. The defendant's manager made the usual affidavit that defendant had a good defence on the merits, and that he was informed and verily believed that the plaintiff resided at Oak Lake, in the province of Manitoba, that address being given by the plaintiff on the writ of summons. The learned

Judge to whom the application was made refused to make the order, but he gives no reasons for doing so. In O. W. Kerr Co. v. Lowe, 3 W. L. R. 400, Wetmore, J. held that the statement, "I have in my belief a good defence to the action herein, on the merits" was sufficient. If that be the case, the positive statement of the defendant's manager is certainly sufficient. In Balcovski v. Olsen, 3 W. L. R. 367, that same learned Judge held that an expression similar to the above as to plaintiff's residence and his means of knowledge was sufficient. With both of these cases I agree. As no evidence was given that the plaintiff had assets in the province, the only other ground on which the learned Judge could have refused the application was that it was made too late. In Clark v. Hamilton, 3 Terr. L. R. 110, it was decided by the Court en Banc, Supreme Court of the North-West Territories, that the making of the order was in the discretion of the Judge, and that our rule which had been amended to read as it does now shortly before assimilated our practice to what it is in England, excepting in certain particulars which do not affect this case. Now the practice in England is that the application may be made at any stage of the proceedings. In Lydney & Wigpool Iron Ore Co. v. Bird, 23 Ch. D. 358, it was made after notice of trial was given, that being the stage in this case when the application was made. In re Smith, 75 L. T. R. 46, the Court of Appeal came to the same decision. Lopes, L.J., says at p. 48, "I do not think that under Order LXV. there is any hard and fast rule to prevent an application for security for costs from being made at any stage of the proceedings. Nothing here has happened to preclude the propriety of ordering security for costs to be given." I am of the opinion that this language applies to this case. It might have been in this case that if the learned Judge had granted the order he might have exercised his discretion in not staying proceedings, the plaintiff having made arrangements for his witnesses in Manitoba to attend the trial which was fixed for the 20th October, 1914, the application having been made on the 9th of that month, but that time having now passed there is no necessity for considering the making of that a term of the order.

The appeal should be allowed with costs. The costs of the application to the Judge in the first instance being costs in the cause.

Appeal allowed.

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

BROCKLEBANK v. BARTER.

Contract—Formal—Part of Wider Contract — Admission of Extrinsic Evidence to Alter—Alberta Evidence Act, sec. 12—Construction.

A formal contract between B. and T. to erect part of a building had been signed by B. subject to modifications contained in a letter from him to T. agreed to buy T. orally before the contract was signed and afterwards confirmed by T. by letter.

Held, that B. might prove that the formal contract was not the entire contract but an item of another and wider one.

Eaton v. *Crooks*, 3 A. L. R., followed.

Section 12 of the Alberta Evidence Act to the effect that no one can recover against personal representatives in respect of any matter occuring before the death of the deceased person "on his own evidence" refers to his own "oral" evidence.

Per STUART, J.:—Where something overlooked in a formal contract is shortly afterwards agreed upon by the parties one of whom writes a letter fixing the matter instead of altering the contract, such letter should be considered as forming part of the contract.

An appeal by plaintiff from the judgment of the Chief Justice in favour of plaintiff to have amount thereof increased.

The appeal was heard by SCOTT, STUART, BECK and SIMMONS, JJ.

A. H. Clarke, K.C., for plaintiff, appellant.

A. A. McGillivray, for defendant, respondent.

BECK, J.:—This is an appeal from the decision of the learned Chief Justice at the trial without a jury in which he found $588.50 owing to the plaintiff who now appeals for the purpose of having the judgment in his favour increased by the sum of $4,513.50.

The defendants are the executors of the will of the late Jeremiah Travis, for whom the plaintiff contracted to erect a building. The contract is dated the 19th April, 1911. Mr. Travis had previously—on the 27th October, 1910—obtained a contract from the Foster Cartage Co. for the excavation

and concrete work for the building in question. It is admitted that this earlier contract covered substantially only the exterior walls of the basement and these to the height only of 9 feet, above the level of the basement floor.

Prior to the execution of the contract between the plaintiff and Mr. Travis of the 19th April, 1911, the plaintiff put in a tender dated the 13th March, 1911, offering to do the work and supply the materials according to plans and specifications for $117,993; and another alternative tender dated the 18th March, 1911, for "a commission of 9 per cent. on an estimated cost of $105,922.49."

The architects' estimate of the cost of the whole work was $115,000 including the Foster Cartage contract, which amounted approximately to $5,000 leaving the estimated cost of the work to be done by the plaintiff approximately $110,000 It is admitted that both these tenders covered all the work of construction not covered by the Foster contract, that is, all above the concrete walls brought up to a height of 9 feet from the level of the basement floor but including certain concrete work on the interior of the basement.

About the 10th April Mr. Travis met the plaintiff and told him that his tenders were too high and the matter was discussed to some extent. Then on the 17th April Mr. Travis telephoned to the plaintiff asking him to meet him the next morning in Mr. Mapson's office. This was not the architects' office and the architect was not present at the meeting. The plaintiff and Mr. Travis accordingly met in Mr. Mapson's office on the morning of the 18th April. As a result of the conference at the meeting the plaintiff took away the plans and specifications and subsequently on the same day wrote Mr. Travis the following letter:—

"April 18th, 1911.

"Hon. J. Travis,
Calgary.

"Dear Sir:—After carefully going into the proposition submitted to me by you this morning I have decided to accept your offer on the following conditions.

"1st. The Foster Cartage Co. to bring all concrete up to the level of the sidewalk; and

"2nd. You to pay all wages fortnightly and all accounts on the first of every month for material supplied and work done.

"3rd. You to furnish all gravel for the completion of the building.

"4th. You have already taken out a permit.

"5th. You to go with me to the dealers and assist me to buy as cheaply as possible for cash.

"In consideration of these concessions I will accept your offer of $100,000 for the erection of your block; these concessions amount to $10,573.50. If this proposition meets with your approval, phone me and I will meet you at Mr. Mapson's office as suggested by you at 10 o'clock to-morrow."

The plaintiff explains that—as circumstances surrounding the writing of this letter—not much headway had at that time been made with the Foster contract; no walls had been constructed and the excavation was not completed; the Foster Company's man were at work; the gravel taken from the excavation could be used for the concrete work but the Foster Company were hauling it away what they did not need for concrete for the fulfilment of their contract; the level of the sidewalk was about 2 feet 6 inches above the height of 9 feet to which the Foster Company were to erect the walls; it being apparent that owing to the Foster Company having to erect forms for the construction of the 9 foot walls and having sufficient gravel on the land they could carry the walls 2 feet 6 inches higher at much less than any one else; and Mr. Travis contemplated arranging with them to do the additional work necessary to enable the plaintiff to start his work at the level of the sidewalk.

The plaintiff says that Mr. Travis accepted the proposition contained in his letter of the 18th April, at the conference on the 19th April, and that then they went from Mr. Mapson's office to the architects' office and signed the contract of the 19th April.

The plaintiff further says that on the morning of the 20th April he said to Mr. Travis personally that he did not think the contract protected him as fully as it should and that on the same day he again spoke to Mr. Travis by telephone to the same effect with the result that Mr. Travis sent him the following letter:—

"Calgary, April 20th, 1911.

"R. A. Blocklebank, Esq.,
Contractor.

"Dear Sir:—In reference to our conversation this morning it was clearly understood that I was to furnish all the gravel

required for concrete work to be done by you, above the foundation. Mr. Bates omitted to have this inserted in the contract as I mentioned to him the Foster Cartage Co. were to leave enough gravel there for the completion of the building, and if there is not enough left I will charge it to their account.

"In reference to the other matters referred to in your letter of the 18th, as this work does not come under your contract I think you are already protected."

Of the five items of the plaintiff's letter of the 18th April, the 2nd is substantially in the formal contract; the 3rd is specifically mentioned in Mr. Travis' letter of the 20th April; the 4th is intended to make it clear that the owner and not the contractor is to bear the expense of the building permit; the 5th suggests a sort of unenforceable agreement or understanding which it was to the interest of both parties to carry out.

This leaves only the 1st item—the only one referring to "work" strictly speaking, though the furnishing of the gravel was apparently considered to be "work" and possibly, too, the other items, for Mr. Travis in his letter of the 20th April first says he will supply the gravel and then says: "In reference to the other matters referred to in your letter of the 18th, as this work does come under your contract I think you are fully protected." It is at all events clear to my mind that Mr. Travis by his letter of the 20th April accepted to the full extent the conditions proposed by Mr. Brocklebank's letter of the 18th as the conditions upon which he would execute the formal contract.

In effect, so far as work and material were in question. Mr. Brocklebank said to Mr. Travis: "If you will (1) furnish all the necessary gravel for the concrete work and (2) will bring the structure up to the level of the sidewalk, so that my contract shall apply only to the structure above the level of the sidewalk, I will sign the formal contract, plans and specifications without putting the architect to the trouble of altering any of these documents;" and Mr. Travis in effect said, "agreed." Assuming that the parties did in fact so agree, it would be a monstrous thing if the law or any rule of evidence were such as to make it impossible for either party to prove that the formal contract was not the entire contract but merely an item of another and wider contract. But in Eaton v. Crooks, 3 Alta. L. R. 1, in a

judgment in which the rest of the Court concurred, I shewed by reason and authority that no law or rule of evidence excluded such proof. I there said: "A writing, although on its face it appears to constitute in itself a complete contract, may, by oral" (or other) "evidence be shewn to constitute only a part of the real contract, and in some cases, to be more specific, to be merely a means adopted by the parties to carry their real agreement into effect. If the latter be the purpose there may be an apparent inconsistency by reason of a writing stating a false relationship between the parties as a covenient means of carrying into effect their real purpose. . . .

"The terms of the instrument are inconsistent with the real agreement, which may be proved by oral" (or other) "evidence; but the giving of the instrument in that form is not inconsistent but in accordance with the true agreement."

In my opinion therefore the evidence of the real agreement between the parties was unquestionably properly admitted and the effect of it is not ambiguous or doubtful but quite clearly establishes the plaintiff's contention by the letters of the 18th and 20th of April interpreted in the surrounding circumstances.

I think sec. 12 of the Alberta Evidence Act (ch. 3 of the Statutes of 1910, 2nd Sess.) has no application. That section prevents one recovering against the personal representatives of a deceased person "on his own evidence," unless such evidence is corroborated by some other material evidence. That surely means on his own oral evidence. Here the plaintiff's case is established, in my opinion, by documentary evidence.

I think too that the learned Chief Justice would have come to the same conclusion both upon the facts and the law had he not probably from the aspect which one or another of the counsel at the trial put upon the case, had it in his mind that the terms of the agreement outside the formal contract were being sought to be proved by oral evidence, with the letters merely by way of corroboration.

In the result I think the appeal should be allowed with costs. The judgment below increased by the sum of $4,513.50, the total amount of the judgment to be at interest of 5 per cent. per annum from the commencement of the action and there being a declaration of a mechanic's lien in the usual form and the plaintiff should have his costs below.

STUART, J.:—I think this appeal should be allowed. Upon reading the documents I am unable to see how any question of credibility of witnesses could have been involved at all. There is the letter from Brocklebank to Travis of the 18th; there is the contract signed on the 19th; and there is the letter from Travis to Brocklebank on the 20th. In such a matter I think the occurrences should be treated as practically contemporaneous. If a man signs a large contract which requires great care and consideration at 10 o'clock and goes away but bethinks him of something in about an hour or so and hurries back to the other party saying that something had been overlooked and the other party quite willingly considers it, as any honourable man would, and writes a letter fixing it up instead of going to the trouble of altering the formal contract surely it should be treated as a proceeding simultaneous with the signature of the contract and surely the letter should be treated as attached to and forming part of the contract. Of course it will be a question in each case as to where you should draw the line, but I think in this case the fact that the letter was not signed till next day should make no difference. The one letter, that of Brocklebank, was signed the day before the contract, it was received by Travis before the contract was signed, he knew that Brocklebank was signing upon the condition mentioned in the letter and the next day he wrote confirming this and assuring Brocklebank that he was fully protected. I am with respect unable to see how there can reasonably be suggested any meaning but one to this letter. It means beyond all doubt to my mind this: "Your contract does not cover the work of bringing all concrete up to the sidewalk level." I tink the matter should be treated just as if Travis had endorsed this on the contract or on the specifications.

Any statement Brocklebank may have made to the Credit Foncier Canadien cannot alter this and could only create an estoppel in their favour.

The appeal should be allowed with costs, the judgment below varied and increased by adding thereto the sum of $4,513.50, and the plaintiff should have judgment for his costs of the action.

SCOTT and SIMMONS, JJ., concurred with BECK, J.

Appeal allowed with costs.

ALBERTA.

SIMMONS, J. DECEMBER 23RD, 1914.

SUPREME COURT.

CHAMBERS.

SHIRK ET AL. v. BATE ET AL.

Discovery—Examination for—Rule 371—Refusal to Answer Questions — Postponement until Disposition of Prior Issue—Account.

The statement of claim alleged that the defendant B. as trustee of a Syndicate received various moneys and shares which he wrongfully used for purposes other than those of the Syndicate. The plaintiffs claimed an accounting. The fiduciary relationship was denied in the statement of defence.

***Held*, that discovery as to the disposition of the property alleged to be the subject matter of the breach should be postponed until the main issue, namely the breach of the fiduciary relationship, had been established.**

***Bedell* v. *Ryckman*, 5 O. L. R. 670, followed.**

Motion by plaintiff to commit defendant Bate for contempt of Court for refusing to answer certain questions on examination for discovery.

J. McKinley Cameron, for plaintiffs.

J. J. McDonald, for defendants.

SIMMONS, J.:—The statement of claim alleges that the plaintiffs and Henry Hilliard, H. A. Langford, George Horn and the defendant Bates, entered into a syndicate or partnership agreement to incorporate companies to deal in and develop oil lesses in the Province of Alberta.

As a result the defendant company, the Producers Oil and Gas Company, Limited, and three other defendant oil companies were incorporated. After reciting the terms of the syndicate agreement and the dealings which took place in regard to certain transactions relating to allotment of shares, addition of other members to the syndicate and acquiring of shares by purchase or otherwise of the defendant companies, one from another, the plaintiffs then alleged as follows in paragraphs 14 and 15 of his claim:—

"Plaintiff's claim that the defendant Bate was trustee of the said syndicate or partnership, and received the various sums of money mentioned in this statement of claim as being paid by the promoters, and has used said money for the purchase of leases and the payment of rentals on oil rights which he has transferred to the Producers Oil & Gas Company, Limited, and has received as said trustee, two hundred and thirty-five thousand (235,000) fully paid up shares of the capital stock of the Producers Oil & Gas Company, Limited, and has also received shares in the capital stock of the Fidelity Oil & Gas Company, Limited, Progress Oil & Gas Company, Limited, and International Oil & Gas Company, Limited, as such trustee.

"The plaintiffs further claim that the said Richard Bate has diverted said moneys and said shares from the purposes of the syndicate and wrongfully and unlawfully converted to his own use and benefit the moneys paid to him as such trustee and said shares of the stock of the defendant companies, and has sold shares and converted the proceeds thereof to his own use, and has exchanged said shares for real and personal property and has used such money and proceeds of shares for the purchase of real and personal property without the knowledge or consent of the plaintiffs."

The plaintiffs then ask for (a) and (b) an account by the defendant Bates of all monies received by him from the other members of the syndicate and the application made by him of said moneys, and (c) an account of all stock issued or allotted to Bates by the defendant companies and an account of all properties purchased by the defendant Bates with any of said moneys or stock.

The defendant while under examination for discovery refused to answer questions under (c).

The defendant in his statement of defence specifically denies the allegations that he was a trustee for the plaintiffs, and puts the plaintiffs squarely to the proof of their allegations of a fiduciary relation.

Rule 371 must be taken as intended for just such a case as this.

The plaintiffs want to prosecute an inquiry into the business transactions of the defendant upon the assumption that they will establish a breach of fiduciary relation. If the rule were not applied strictly under the circumstances such as

are disclosed in this case, the plaintiffs might bring an action and allege a fiduciary relation for the sole purpose of gaining access to the defendant's books, accounts, and business transactions and relations.

It is a condition precedent to the right of discovery relating to the disposition of the property alleged to be the subject of the trust that this evidence is material to the main issue, namely; the breach of trust.

The plaintiffs do not contend that such is the case. I hold that the plaintiffs must establish the alleged breach of the fiduciary relations before they can have inquiry into the disposition of the property alleged to be the subject matter of the breach unless evidence under the latter head is proper evidence on the issue which forms the basis of action. Bedell v. Ryckman, 5 O. L. R. 670.

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

WA KIE ET AL. v. CUDDY.

Trespass — Justification — Search Warrant — Manner of Execution — Common Gaming House — Forcible Entry — Necessary Preliminaries — Dwelling House — Reasonable Force — Bona Fides — Criminal Code, secs. 226, 228, 229, 629, 641, 642.

Plaintiffs were owners of an assembly room suspected of being used as a common gaming house. In executing a search order made in pursuance of section 641 of the Criminal Code, defendant broke into the plaintiff's premises after trying to open the doors but without stating the cause of his coming or making request to have doors opened.

Held, that in all cases of a search warrant or order the police officer executing the same must have it in his possession for inspection at the time of search, but that in the case of a dwelling house the police officer executing the warrant must signify the cause of his coming and demand admittance before forcing entry—not so where the building is of another class, more circumspection being required in forcing entry to a dwelling house than in other cases.

Where an officer acts *bona fide* the Court will not be curious to find that excessive force has been used.

An appeal from the judgment of the Chief Justice, 28 W. L. R. 747, dismissing an action for damages for trespass against the chief constable of the city of Calgary.

The appeal was heard by SCOTT, STUART, BECK and SIMMONS, JJ.

A. A. McGillivray, for plaintiffs, appellants.

C. J. Ford, for defendant, respondent.

The judgment of the Court was delivered by

BECK, J.:—This is an appeal from the decision of the learned Chief Justice at the trial without a jury dismissing the action with costs.

The action is one of trespass against the chief constable of the city of Calgary.

The facts briefly are as follows:—

The plaintiffs are the owners, as trustees for a lodge of Chinese Masons, of premises in Calgary described as 107 Second Avenue West. The building was a two storey building. There were two street doors which were a few feet apart; one was an entrance to the ground floor, and the other to the upper floor. There was no internal stairway. The upstairs consisted of a large hall or assembly room with a small room adjoining. It was here that the regular meetings of the lodge were held. The lower storey consisted of an ante-room in front and a large hall in the rear. This was used for open meetings of the lodge and as a general recreation room for reading and playing cards, etc. To the large room there was a door in the rear opening upon a lane.

On the 17th of October, 1913, the defendant Cuddy made a report in writing to the police magistrate that there were good grounds for believing, and that he did believe, that the premises 107 Second Avenue East, Calgary, were being kept and used as a common gaming house as defined by sec. 226 of the Criminal Code. Upon this report the police magistrate made an order addressed to the defendant in the following terms: "I hereby authorize you, the chief constable or inspector or sergeant of the Calgary Police Force to enter the premises of 107 Second Avenue East, with such constables as are deemed requisite by you or him, and, if necessary, to use such force for the purpose of effecting such entry, whether by breaking open doors or otherwise and to take into custody all persons who are found therein and to seize all tables and instruments of gaming and all money and security for moneys found on such premises and to bring the same before me or such other justice as may be presiding in my stead, to be

by me or him dealt with according to law." The authority for such an order as well as the duty of the person authorized by the order is outlined in sec. 641 of the Criminal Code: "If the chief constable reports in writing to the police magistrate that there are good grounds for believing and that he does believe that any house, room or place is kept or used as a common gaming house as defined in sec. 226 such police magistrate may by order in writing order the chief constable to enter any such house, room or place with such constables as are deemed requisite by him, and if necessary to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who are found therein and to seize, etc.

"2. The chief constable making such entry in obedience to any such order, may, with the assistance of one or more constables, search all parts of the house, room or place which he has so entered where he suspects that tables or instruments of gaming are concealed and all persons whom he finds in such house or premises, and seize all tables and instruments of gaming which he so finds." It is, I think, important to note also the severity of the consequences following upon the execution of such an order for search.

Section 1642 authorizes the examination under oath of any person found on the premises and apprehended in pursuance of the order.

Section 986 provides that in any prosecution under sec. 228 for keeping a common gaming house or under sec. 229 for playing or looking on while any other person is playing in a common gaming house it shall be prima facie evidence that a house, room or place is used as a common gaming house and that the persons found therein are unlawfully playing herein—

(a) If any constable or officer authorized to enter such a house, room or place is wilfully prevented from or obstructed or delayed in entering the same or any part thereof; or,

(b) If any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming or with any means or contrivance for concealing, removing or destroying any instrument of gaming.

In executing the search order in this case, the defendant Cuddy went with a number of constables to the premises in question. Cuddy and one or two of the constables remained at the front street door and he sent some of the other constables around the building to the back door.

The evidence as to what was done is briefly as follows: The front door was tried; it was found to be locked; the handle was turned several times; they knocked; they waited a few moments; then with an axe a corner of the upper portion of the door, which was of glass, was broken, and through the hole then made, the key which was in the lock inside was turned, and thus entry obtained.

One of the constables who went to the back of the building said that he had been to the place once or twice before and that the windows were then let down from the top, and by standing on the ledge one could see what was going on in the room; that on this occasion they were closed and being "frosted," he could not see in; and that he, therefore, broke a pane in order to see what was going on. He said he did this because one of the other constables had tried the back door and found it locked. "So I ran up the stairs and broke the glass so that I could see in, because if you don't get in in time everything will be cleaned off the tables." One of the constables tried to break open the back door, first trying to open it by the handle and then hammering it so that a panel was cracked; he was stopped by a constable who had entered by the front door.

The question in this case is, was force to this extent justified under the circumstances by the order for search. The Criminal Code (secs. 629 et seq.), provides for the issue of search warrants in a variety of cases.

The common law authorized the issue of a search warrant only in the case of larceny or suspected larceny. See 9 Halsbury Laws of England, tit. Criminal Law & Procedure, p. 625, 22 Ib. tit. Police, p. 4986c, Encyclopædia of the Laws of England, 2nd Ed., Vol. 13, tit. Search Warrants, p. 199, and cases there cited.

We were referred to the third resolution in Semayne's Case, 5 Coke, 91, 1 Sm. L. Cases, 11th Ed., p. 105:—

"In all cases when the King is a party, the sheriff (if the doors be not open), may break the party's house either to arrest him or to do other execution of the King's process if otherwise he cannot enter. But before he breaks it, he

ought to signify the cause of his coming and to make requests to open the doors."

It is urged that in execution of a search warrant the police officer was bound as a thing preceding the search to signify the cause of his coming and to make request to open the doors before being entitled to make the search.

This resolution, however, refers to process, e.g., a warrant which does not expressly give the right to enter, as does a search warrant. Again it refers to a house—a dwelling house. What is in question here is a room for occasional or habitual assembly only.

In Codd v. Cabe (1876), 1 Ex. D. 352, it was held that when a warrant has been issued to apprehend a person for an offence for which he cannot be arrested without a warrant, the police officer must have the warrant in his possession at the time of the arrest ready to be produced if inspection of it is asked.

I think a similar rule applies to a search warrant.

The first preliminary, therefore, to the execution of a search warrant, and, I think, that the police officer should have the warrant in his possession at the time of the search.

Laucock v. Brown (1819), 2 B. & Ald. 593, 106 E. R. 482, was a case of a search warrant under a statute (22-23 Car. 11, ch. 25, sec. 2), which empowered game keepers and other persons, authorized by warrant under the hand and seal of any justice of the peace for the county in the day time to search the houses, out-houses or other places of certain persons for guns, bows, greyhounds, etc., and to seize, detain and keep the same, etc. The Court en banc of four Judges affirming the decision of the trial Judge held that a search warrant under the statute was unlawfully executed inasmuch as no demand of admittance had been made before breaking open the outer door of the dwelling house of the plaintiff's house.

I think this rule is applicable to all search warrants or orders for search unless it is clear from the statute authorizing the search warrant that a demand to open is not necessary. The second preliminary therefore, I think, to the execution of a search warrant is, generally speaking, when the place to be searched is a dwelling house, is a demand to open.

In Hodder v. Williams, [1895] 2 Q. B. 663, the statement made in Smith's leading cases in the notes to Semayne's

Case is approved. "The maxim that 'a man's house is his castle' only extends to his dwelling house; therefore a barn or out-house, not connected with the dwelling house may be broken open in order to levy an execution, Penton v. Brown, 1 Sid. 181, 186, but not to make a distress for rent, Brown v. Glenn, 16 Q. B. 254."

In that case the plaintiff, who was a coach builder, for the purposes of his business, occupied buildings as a workshop and for storage of goods, no one living there. Counsel for the plaintiff argued that the reasons given for the doctrine of Semayne's Case apply to a building like a shop or warehouse in which the owner or his servants would be likely to be when it is forcibly entered as much as to a dwelling house. The Court declined to accede to this argument. Lord Esher, M.R., said: "None of the authorities on the subject draw any such distinction as was suggested in argument between a building such as a shop or warehouse and a barn or out-house. The only distinction drawn is between a dwelling house and a building which is not a dwelling house."

The last rule, therefore, which I have set down does not, I think, apply, except in the case of a building, room or place used as a dwelling in the ordinary acceptance of the word.

So I conclude that in the execution of a search warrant or order for search, where the place is not a dwelling house —or a room or other place—"parcel of a house" (Denton v. Brown, 1 Keb. 698; 1 Sid. 186)—the police officer executing it must have the search warrant with him, in order to exhibit it for inspection if it is asked and in that case produce it and permit inspection of it, but he need not under all circumstances first demand an entrance or signify the cause of his coming.

Nevertheless every officer acting under warrant or other lawful authority is protected only in so far as he uses no more force than, under the circumstances, is reasonably necessary and is liable in trespass for any excess. 23 Halsbury's Laws of England, p. 812, and cases there cited. The statute under which the order for search was made expressly authorizes the person to whom the order is directed "if necessary to use force for the purpose of effecting such entry." When it is necessary to use force to effect an entry must depend upon the circumstances of each particular case. If it is the case of a dwelling house, much more circumspec-

tion would be called for than in the case of another class of building. A different case of conduct might reasonably be looked for in a case where the building is occupied and where it is not.

I think one should not be curious or astute to find an excess where the officer appears to have acted bona fide. I cannot find mala fides and I am not inclined to find that under all the circumstances appearing in the present case there was an excess of force.

I think, therefore, the judgment of the learned Chief Justice dismissing the action with costs should be affirmed with costs.

Appeal dismissed.

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

HAIGH v. GRAND TRUNK PACIFIC R. W. CO.

Negligence—Intervention to Prevent Accident—Intervener Injured—Contributory Negligence—Verdict of a Jury.

Where the plaintiff, a brakeman, was injured by going on to the track in front of a moving train in order to apply the brakes and so prevent a possible accident to others, it was *held*, that it was for the jury to find whether or not his action was so unnecessary, reckless or rash as to disentitle him to recover damages.

***Held*, following the American rule, that in considering the intervener's conduct, errors of judgment resulting from the excitement and confusion occasioned by the emergency should not be charged against him, and that he is entitled to recover damages for injuries received on the grounds of (1) negligence against the person in danger, (2) negligence against himself after his intervention.**

An appeal from a judgment of the Chief Justice entered in favour of plaintiff on the verdict of a jury for damages for injuries caused by the negligence of defendant or its servants.

The appeal was heard by SCOTT, STUART, BECK and SIMMONS, JJ.

O. M. Biggar, K.C., for defendant, appellant.

A. A. McGillvray, for plaintiff, respondent.

The judgment of the Court was delivered by

BECK, J.:— This is an appeal by the defendant company from the judgment of the learned Chief Justice entered for the plaintiff upon the verdict of a jury. The action was one for negligence; the jury were well and fully instructed; there was conflicting evidence so that it seems not possible so to reconcile the evidence as to avoid the conclusion that there was perjury on one side or the other; there certainly was evidence of negligence and I think that of the grounds of appeal taken the only one which calls for consideration is the question of contributory negligence or perhaps not that question but the question of the defendant company's liability to the plaintiffs at all under the rather peculiar circumstances of the case; and for the purpose of considering this question we must take it that the jury has accepted substantially the story of the plaintiff and his witnesses. The plaintiff was a brakeman for the defendant company. The train he was attached to was a construction train for a "gang" working near a place called Irrecana. The caboose had been uncoupled and the rest of the train had gone some distance further on; lunch time having arrived the rest of the train was being backed to couple with the caboose in order to take the whole train to Irrecana some two miles away. The plaintiff finding that the train was being backed towards the caboose too rapidly, and having failed by signals to get the engineer to reduce the speed and fearing that persons in the caboose and in one of the box cars would be injured by reason of the force of the collision got upon the track in face of the last car for the purpose of turning the angle cock of the air brake, which would have had the effect of applying the brake and stopping the train. Under the circumstances detailed in the evidence it was undoubtedly a dangerous, but whether it was an unnecessary reckless or rash thing to do was for the jury to decide. The jury were directed fully upon the question of his conduct from the point of view of contributory negligence on the supposition that if he was not guilty of contributory negligence he was entitled to recover and they have found in favour of the plaintiff.

Under the circumstances it is impossible to interfere with the jury's finding upon the facts as they have decided in favour of the plaintiff, though I am inclined to think that had the verdict been the other way the plaintiff might per-

haps have had ground to complain that the charge of the learned Judge failed to express clearly the rights of a person intervening as the plaintiff did.

The question of law involved has been much considered in many Courts of the United States. The law is collected in a note to Corbin v. Philadelphia, 195 Pa. 461, in 49 L. R. Ann. (1900), p. 715, and I have been able to refer to Condiff v. Kansas City, &c., Rw. Co., 45 Kansas, 256; 48 Am. & Eng. R. R. Cases, p. 417, and Pennsylvania Co. v. Langendorff (Ohio Supreme Ct., 1891), 49 Am. & Eng. R.R. Cases, p. 317, and I take the American law to be that a person is justified in law in intervening to save from apparent probable death or serious injury a third person independently of any contractual or natural relationship between the person in danger and the intervener; unless his intervention was unnecessary, reckless or rash under the circumstances in which the judgment of prudent persons and that in considering his conduct he should not be charged with errors of judgment resulting from the excitement and confusion occasioned by the emergency, and that if the intervener is injured he can recover on the ground either of negligence against the person in danger or of negligence against himself occurring after his intervention began. This proposition, it seems to me, is supported by the reasoning in Connell v. Prescott, 20 O. A. R. 49; 22 S. C. R. 147; Seymour v. Winnipeg Elect. Co., 19 Man. R. 412; Love v. New Fairview, 10 B. C. R. 330; Roebuck v. Norwegian Titanic Co. (1884), 1 T. L. R. 117; and the Scotch case of Woods v. Caledonia Railway Co. (1886), 23 Sc. L. R. 798, which is not available but of which a considerable note is to be found in Love v. Fairview, supra. As on the findings of fact made by the jury and the application of the foregoing proposition of law, I think the plaintiff was entitled to judgment, the appeal, in my opinion, should be dismissed with costs.

Appeal dismissed.

ALBERTA.

SIMMONS, J. DECEMBER 23RD, 1914.

SUPREME COURT.

CHAMBERS.

REX v. HURST.

Arrest without Warrant—Illegality of—Trial without Protest—Dismissal of Charge—Further Charge Preferred—Objection to Jurisdiction—Conviction—Certiorari.

The defendant, having been unlawfully arrested on a charge of vagrancy by reason of there being no warrant, appeared without protest before a magistrate who dismissed the charge. Prior to its dismissal a further charge of having opium in his possession, contrary to section 3 of the Opium and Drug Act, was preferred against the defendant upon which he was convicted. On the hearing of the latter charge the accused objected to the jurisdiction of the magistrate on the ground that his arrest without a warrant was illegal.

***Held*, that the defendant not having objected to the illegality of the warrant upon which he was arrested upon the charge of vagrancy when tried on that charge, could not raise it on the second charge.**

***Queen* v. *Hughes*, 4 Q. B. D. 614, followed.**

***Rex* v. *Baptiste Paul*, 20 C. C. C. 159, 161, referred to.**

Application by certiorari to quash a conviction by a police magistrate.

J. B. Barron, for appellant.

J. T. Shaw, for respondent.

SIMMONS, J.:—The defendant, Joseph Hurst, was arrested in the city of Calgary on the evening of November 7th, 1914, on a charge of vagrancy under sec. 238 (1) of the Criminal Code. The arrest was made without a warrant and it is admitted that for this reason the arrest was illegal.

On the 9th day of November the defendant appeared (without protest) before Gilbert E. Saunders, police magistrate in the city of Calgary, and this charge was dismissed.

Before the said charge was disposed of a charge was laid against the defendant of having opium in his possession contrary to sec. 3 of the "Opium and Drug Act."

Upon this charge he was convicted and sentenced to two months' imprisonment.

On the trial of this charge the defendant's counsel objected to the jurisdiction of the magistrate on the ground that the defendant was illegally arrested without a warrant.

In Rex v. Baptiste Paul, 20 C. C. C. 159, I expressed the view that if the magistrate had jurisdiction over the matter it was immaterial how the defendant was brought before him.

In that case I followed Queen v. Hughes, 4 Q. B. D. 614.

In Queen v. Hughes the majority of the Judges held that the defendant having failed to object to the jurisdiction it could not be subsequently raised if the justices had jurisdiction over the matter.

But the majority of the Judges went further and expressed the view that as soon as the defendant was brought before the justices, if they had jurisdiction over the subject matter it was immaterial as to how the defendant was brought before them. Per Lotes, J.: "I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, was brought by force, or under an illegal warrant, is immaterial, being brought before the Justices (however brought there), if they had jurisdiction, in respect of time and place over the offence, were competent to entertain the charge."

Hawkins, J., expressed a similar view, and Pollock, B., and Lindley, J., concurred.

In Rex v. Baptiste Paul, 20 C. C. C. 161, my brother Beck took a different view, citing Pearks et al. Ltd. v. Richardson, [1902] 1 K. B. 91.

With much respect I do not think Lord Alverstone, C.J., asserts any principle in this judgment contrary to the views of the Judges in Queen v. Hughes. Section 62 of the Companies Ordinance required service in a civil process to be made, in a certain way. The judgment in this case went no further than to say that in the absence of any legislative authority or any ruled practice made by competent authority, the service of a summons upon a company in a summary prosecution for violation of a local statute should be made in the manner prescribed by sec. 62 of the Companies Ordinance. There was nothing more than the enunciation of rule of practice to the effect that legislation had provided for service to be made upon an incorporated company in a civil proceeding in a certain way, and that in a summary proceeding for violation of a statute the same practice should

be followed. A company cannot be served in the way a person is served, and if necessary, some officer of the company must be served on its behalf.

In the case before me the material does not disclose that any objection was made to the jurisdiction of the magistrate when the defendant was charged with vagrancy.

The affidavit of James Duguid, Police Court clerk, merely says "that the charge of vagrancy against the accused was disposed of and upon that charge he was dismissed." Not having raised the question of the illegality of the warrant upon which he was arrested upon the charge of vagrancy when he came before the magistrate upon that charge he cannot raise it now.

Queen v. Hughes, supra.

I would, therefore, dismiss the application with costs.

Conviction affirmed.

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

MANUFACTURERS LIFE INSURANCE CO. ET AL. v. WALSH.

Vendor and Purchaser — Agreement for Sale of Land — Rescission — "Reservations" — Evidence of — Preliminary Memorandum — Misrepresentation—Adding Party Plaintiff—Costs.

An agreement for the sale of land subject to "reservations" will not be rescinded on the ground that the reservations are not specifically described if there is sufficient description to put the purchaser upon enquiry.

A memorandum preliminary to an agreement for the sale of land which set out reservations with more detail than the formal agreement is admissible as evidence to shew that the purchaser knew that the transfer was to be subject to specific reservations.

Where subsequently to the commencement of an action a necessary party plaintiff is added on the application of the original plaintiff, and the defendant continues to defend unsuccessfully, defendant will not be entitled to the costs up to, but only of, the amendment.

An appeal by defendant from the judgment of BECK, J., in favour of plaintiff granting specific performance of an agreement for the sale of land.

The appeal was heard by SCOTT, STUART and SIMMONS, JJ.

J. T. Shaw for plaintiff, respondent.

A. G. Virtue, for defendant, appellant.

The judgment of the Court was delivered by

SCOTT, J.:—The action was commenced by the insurance company as sole plaintiff claiming under an agreement entered into by the appellant for the purchase from the O. W. Kerr Company of a section of land in the vicinity of Warner, and under an assignment from that company its rights and interests under the agreement. The insurance company alleged that the appellant had made default in the payment of the purchase money and that, under the power contained in the agreement, it had by notice in writing declared it to be null and void, and his rights and interests thereunder determined. It claimed by way of relief: (1) An order for the delivery of possession; (2) A judgment that the agreement is determined and that the rights and interests of the appellant thereunder have ceased and determined; (3) That all payments made by him under the agreement are forfeited by way of liquidated damages, and (4) In the alternative, payment by him of all payment of principal and interest in arrear.

Defendant Josephson is shewn to have filed a caveat against the lands, claiming under an agreement for the sale thereof by the O. W. Kerr Company to him. The only relief claimed by the insurance company as against him was the removal of his caveat and costs. No defence was made by him, and the trial Judge at the conclusion of the trial stated that he would make an order declaring that he had no claim.

The appellant having by his statement of defence charged that the insurance company had not given him notice of the assignment from the O. W. Kerr Company, the insurance company obtained leave at the trial to amend by adding the O. W. Kerr Company as a party plaintiff and by alleging that they were joined for the purpose of perfecting the right of the insurance company to maintain the action.

In his statement of defence the appellant denies that any notice was given by or on behalf of the insurance company declaring the agreement void, or determining his interests thereunder, and I may here state that no evidence

of any such notice having been given was adduced at the trial.

The other defences relied upon by the appellant at the trial were that the insurance company was, by reason of defects in its title, unable to give him a clear title to the property and that, at the time the agreement was entered into, certain false and fraudulent representations were made by the O. W. Kerr Company or its agents as to the nature of the soil, the contour of the land and its value and that he entered into the agreement relying upon those representations.

The trial Judge held that there was no intentional misrepresentation with regard to the land, nor any unintentional material misrepresentation, and that plaintiffs were entitled to specific performance of the agreement.

On 11th May, 1910, the insurance company obtained a certificate of title to the lands, except all coal and other mineral rights and the right to work the same, the title being also subject to the right of expropriation of certain portions of the land reserved in the transfer thereof from the Alberta Railway and Coal Company to the O. W. Kerr Company. The reservations in that transfer are as follows:—

"All coal and other minerals in and under the said land and the right to use so much of said land or the surface thereof as the company may consider necessary for the purpose of removing the said coal and minerals, and any portion of said land heretofore taken for public purposes, and also excepting and reserving thereout a right of way 100 feet wide to be used by the company or its successors or assigns for the purpose of irrigation, canals or works, said right of way, if taken, to be paid for in accordance with the value of the land and any improvements upon same, said privilege to be exercised within the period of ten years next following the 26th day of June, A.D., 1906."

The appellant contends that, by reason of these reservations, the plaintiffs are unable to give him a clear title to the property and that he is therefore entitled to rescission of his agreement to purchase.

The agreement in question was made on 22nd September, 1909, and is for the sale and purchase of the property for $15,360, payable $5,120 in cash, and the remainder in five equal annual instalments with interest at 6 per cent. The vendors agreed that, upon the purchaser paying the

purchase money and interest, and otherwise fulfilling the conditions of the agreement, he should be entitled to a conveyance free from incumbrances subject, however, to "all reservations, limitations, provisoes and conditions expressed in the original grant from the Crown to the (blank) company, and in the original contract with the said railway for the sale thereof."

On the day before the date of the agreement the appellant gave to the selling agents of the O. W. Kerr Company his note for the cash payment of $5,210, and he and they then signed a memorandum in which the agents acknowledged receipt of the note subject to the approval of the company, the contract price and the terms of payment being set out substantially the same as in the agreement, the appellant thereby agreed to pay the company the remainder of the purchase money and interest and the company, in consideration of such payment, agreed to convey the lands to him in fee simple, "subject to the reservations, limitations, provisoes and conditions expressed in the original grant from the Crown, or original contract with the railroad company and reserving all mines, minerals, coal or valuable stone in or under said land, and the right of user of part of the surface necessary for working the same and the other reservations and exceptions as above stated."

The agreement is upon a printed form in which a blank left for the name of the company obtaining the grant from the Crown was not filled in and the name of any railroad company does not appear in the agreement or in the memorandum of the previous day. I am of opinion, however, that there was, upon the face of the agreement, sufficient to shew the purchaser that the transfer was to be subject to certain reservations and to enable him to ascertain their nature and extent as, although their nature and extent was not stated, they were described in such manner as would enable him to ascertain what they were with absolute certainty. If he entered into the contract knowing that certain reservations were intended and without making any inquiry as to their nature, he should not now, in my opinion, be permitted to say that he is entitled to a transfer free from them.

The memorandum referred to describes the intended reservations with more detail than they were described in the agreement. Objection was taken, however, to its admissi-

bility as evidence, presumably on the ground that it was superseded by the subsequent agreement. In my opinion the trial Judge was right in admitting it even if the only ground for its admission was to shew that the purchaser knew that the transfer was to be subject to the specified reservations.

The reservation by the Alberta Railway and Irrigation Company of a right of way for irrigation purposes appears to me to have been unnecessary as, in the absence of any such reservation, that company under its act of incorporation (ch. 43 of 1904), could exercise that right as against any subsequent owner of the land. The Act confers upon it all the powers as to expropriation of lands for its purposes as are possessed by railway companies under the Railway Act. Apparently the only effect of the special reservation, if it has any effect, was to restrict to a limited period the right of the company to exercise that power as, under the Railway Act, there is no limit to the time for exercising it.

Since the issue of the certificate of title to the insurance company the only registrations affecting its title are the filing of the caveat by defendant Josephson which I have already referred to, and of a caveat filed by the appellant claiming an interest under the agreement in question. As to the latter no question can arise as, upon his fulfilling his agreement, he will obtain a transfer and certificate of title and his caveat will thereby be removed.

As to the caveat filed by defendant Josephson the effect of the judgment of the trial Judge is that he has no claim upon the land. The judgment is, therefore, conclusive as against him and the insurance company is entitled to obtain an order removing it. Under the agreement the company was not bound to complete his title until the time for the payment of the last instalment of the purchase money and even if the filing of that caveat constituted a cloud upon his title, the company took the necessary steps to remove it before the purchaser was entitled to call upon it to do so.

The only evidence adduced at the trial respecting Josephson's claim consisted of certain letters written by him to the appellant in which he stated in effect that he had bought the land from the O. W. Kerr Company but had sold it back to them a few days before they sold it to the appellant, and that his only claim was for the balance of the purchase

money due by the company to him, and a letter from that company to the Standard Trust Company stating that the land was originally sold to Josephson but that they had repurchased from him and resold to the appellant.

If these letters were properly received as evidence of the transactions referred to in them the utmost that can be inferred from them is that the only interest Josephson could have had in the land was a lien for the balance of the purchase money due him. This would, therefore, be nothing more than an incumbrance which the appellant would be entitled to require the insurance company to pay out of the purchase money due by him, but it would not constitute a defect in title or a ground which would entitle him to repudiate the purchase.

One of the grounds of appeal is that the trial Judge erred in holding that the notice of cancellation given by the insurance company amounted to a rescission of the agreement and entitled the appellant to restitutio in integrum and it is contended on his behalf that the company having elected to take that course, it is not now entitled to claim specific performance.

I have already stated that there was no evidence to shew that such a notice was given. There is, however, the allegation in the statement of claim that it was given and, if the appellant had, by his statement of defence, admitted that it was given, a question might then have arisen whether the insurance company might not have been bound by the allegation, but the appellant having denied the giving of the notice and the giving of it not having been proved, the insurance company is not, in my opinion, bound by its allegation and there is, therefore, nothing to shew that it had elected to rescind the agreement.

Other grounds of appeal are that the trial Judge erred in holding that there was no wilful misrepresentation in a material particular and in not deciding whether or not there was innocent misrepresentation and in not holding that there was innocent misrepresentation and that the contract should be rescinded.

The trial Judge found that there was no intentional misrepresentation and that the appellant had not satisfied him that there was any unintentional material misrepresentation. This, in effect is a finding that the appellant had failed to establish that there was any material misrepresentation and,

as it is only material misrepresentations that are important, he left nothing undeicded.

A large number of witnesses were examined upon the question of misrepresentation, and there is a mass of contradictory evidence respecting it. The trial Judge had ample ground for reaching the conclusion he did upon the question and, in my view, this is not a case in which this Court should review his finding upon that question of fact.

In Coghlan v. Cumberland, [1898] 1 Ch. 704, Lindley, M.R., in his judgment uses words which seem peculiarly applicable to such a case as this. He says:

"When much turns upon the relative credibility of witnesses who have been examined and cross-examined before him a Judge, the Court is sensible of the great advantages he has in seeing and hearing them. . . . and, when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be guided by the impression made on the Judge who saw the witnesses."

The conduct of the appellant subsequent to the alleged misrepresentations was such as might reasonably lead the trial Judge to entertain a doubt whether they were made, or, if made, whether the appellant himself considered them material. He admits that, some months after the agreement was entered into, he entered into possession of the land and that, while in possession, he became aware that it was not such as was represented to him and yet, with that knowledge he, without complaining of the misrepresentations afterwards applied for and obtained an extension of time for the payment of the purchase money at a higher rate of interest and also placed the land in the hands of several agents for sale at a price in excess of that he had agreed to pay for it.

Tho only other ground of appeal is that the trial Judge erred in not holding that the plaintiff should pay the appellant's costs up to the time the O. W. Kerr Company was added as plaintiff, the ground of this contention being that, as the insurance company had not given notice of the assignment of the agreement, it was not entitled to sue upon it and, therefore, that the action was not properly constituted until the O. W. Kerr Company was added as plaintiff.

The trial Judge held that, as the insurance company had obtained from the O. W. Kerr Company a transfer of the land as well as an assignment of the agreement, the ordinary

law respecting assignments of choses in action did not apply and that the O. W. Kerr Company and the Standard Trust Company were, therefore unnecessary parties. He therefore held that the appellant should be entitled to the costs occasioned by their being added.

I express no opinion as to whether the trial Judge was right in this conclusion as, in my view, it is unnecessary to do so. If the appellant is right in his contention that the action was not properly constituted until the O. W. Kerr Company was added and if upon that company being added, the appellant had consented to judgment for the plaintiffs, it might be open to question whether he would not have been entitled to the costs of the action up to that time, but having continued to defend the action after it was properly constituted, I see no reason why the plaintiffs should not have the costs of the action from its inception except of course such costs as may have been occasioned to the appellant by reason of the amendment.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

ALBERT IMPROVEMENT CO. LTD. v. PEVERETT.

Company—Call—Validity of Act of Directors in Authorizing —Disqualified Director—No Quorum—Companies Act, R. S. S. ch. 72, Clause (71) Table A.

Held, that the act of the directors of a company incorporated under the Companies Act, R. S. S. c. 72, in authorizing a call of the whole amount of the subscribed shares of the company was valid under the provisions of clause (71) table A. of the said Ac where that one of the said directors was not qualified.

Appeal from the judgment of NEWLANDS, J., in favour of plaintiff in an action to recover the sum of $2,000, being the amount of a call on the shares of defendant subscribed for by him in the memorandum of association.

The appeal was heard by HAULTAIN, C.J., LAMONT, BROWN, and ELWOOD, JJ.

W. M. Martin, for plaintiff, respondent.

J. F. Frame, K.C., for defendant, appellant.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—The plaintiff is a company duly incorporated under the Companies Act, (R. S. S. ch. 72). The defendant is one of the incorporators of the company, and as a subscriber of the memorandum of association subscribed for 20 shares of $100 each. The memorandum of association was accompanied when registered by articles of association which will be referred to later. The company was duly incorporated on the 26th February, 1913, with a capital of $500,000, divided into 5,000 shares of $100 each. Subject to the special articles of association, the regulations contained in table A. in the first schedule of the Companies Act are applicable to the company. The statutory meeting of the company was held on the 8th March, 1913. By one of the special articles of the company it is provided that:—

"(3) No business shall be transacted at a general meeting unless a quorum of members is present at the time when the meeting proceeds to business, and two members personally present and representing in person or by proxy not less than one-third of the issued capital of the company shall be a quorum, and for the purpose of reckoning a quorum a member being an incorporated company, represented by proxy shall be deemed to be personally present, and clause 37 of table "A" shall not apply to this company."

It was shewn by the evidence that there was a sufficient quorum at the meeting of March 8th to satisfy the requirements of this regulation. At this meeting, under the provisions of clause 12 of the special articles, which replaces clause (58) of table A. the whole of the directors retired from office, and directors for the ensuing year were elected.

Counsel for the appellant argued that the directors appointed at this meeting were the "first directors" and should have been appointed by a majority of the subscribers of the memorandum of association under the provisions of clause 52 of table A. This contention, in my opinion, does not call for serious consideration. "First directors" are usually named in the articles of association, but not uncommonly the articles, instead of naming them, contain a power for the

subscribers to appoint them. In the case of this company there were no first directors named in the articles so that clauses (52) and (53) of table A. applied. As no first directors were appointed under clause (52) the subscribers of the memorandum of association must be deemed to have been the directors under clause (53). If the subscribers of the memorandum had taken action under clause (52) that action would undoubtedly have required the approval of a majority of the subscribers to have become effective.

Under the provisions of clause (53) the subscribers of the memorandum of association became the "first" directors of the company automatically, and it would be absurd to say that the directors who were subsequently appointed at the statutory meeting were the "first" directors, or that the provisions of clause (52) applied to their election.

The special articles of the company provide that the qualifications of a director shall be the holding of at least one share of the company, but that "a director may be appointed and act before acquiring his qualification, but shall in any case acquire the same within one month of his appointment, and unless he shall do so, he shall be deemed to have vacated the office of a director."

One of the nine directors appointed at the statutory meeting on the 8th March, 1913, was Mr. L. A. Rounding, who apparently did not possess the necessary qualification. On October 24th, 1913, a meeting of the directors was held at which five directors, including Mr. Rounding, were present, Mr. Rounding had not acquired his qualification as a director within one month of his appointment, and had therefore, under the regulation mentioned above, vacated his office. At this meeting a call of a whole amount of the subscribed shares of the company was authorized, and notice of this call was duly given to the defendant. It is objected by the appellant (and this is the real ground of this appeal) that as Mr. Rounding was disqualified at the time of this meeting there was not a quorum of the directors present, and therefore the call was not a valid one. The quorum necessary for the transaction of business at a directors' meeting was fixed by the directors at five. There was therefore not a quorum of qualified directors present at this meeting.

Clause (71) of table A. provides that:—

"All acts done by any meeting of the directors or of a committee of directors or by any person acting as a director

shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid or that they or any of them were disqualified be as valid as if every such person had been duly appointed and was qualified to be a director."

A similar provision in the English Acts has been held over and over again to cure irregularities quite as serious as the one in question. In support of the opposite view the cases of Howbeach Coal Co. v. Tesque, 5 H. & N. 151, and In re Staffordshire Gas & Coke Co., ex parte Nicholson, 66 L. T. 413, were cited. The first of these cases was practically overruled by the Court of Appeal in Dawson v. African Consolidated Land & Transfer Co., [1898] 1 Ch. 6; 67 L. J. Ch. 47, which was followed in British Asbestos Co. v. Boyd, [1903] 2 Ch. 439; 73 L. J. Ch. 31. The two last cited cases were followed in Channel Collieries Trust, Ltd. v. Dover, St. Margarets and Martin Mill Light Railway Co., [1914] 1 Ch. 568; 83 L. J. Ch. 417, in which case Sargant, J., thought that In re Staffordshire Gas & Coke Co., was inconsistent with the later decisions. The decision in the Channel Collieries case has been recently affirmed in the Court of Appeal (see 30 T. L. R. 647).

On the authority of these cases it must therefore be held that the act of the directors in making the call in question was a valid one under the provisions of clause (71) table A. I do not think that it is necessary for the purpose of this appeal to express any opinion with regard to the option given to Gordon, McKay & Co. Ltd., to purchase all the shares of the company. If Mr. Peverett is bound by that option he must take his shares subject to it, and if he is not bound by it he is entitled to his shares in the ordinary form. In view of the reference in the judgment appealed from to sec. 13 of the Companies Act and the statement that the defendant was liable for the full amount of his shares when the action was brought, it might be well to say that, in my opinion, the defendant was only liable for the amount of the shares subscribed for by him by virtue of the call which was duly made in respect of them.

Appeal dismissed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

POWELL v. CANADIAN NORTHERN R. W. CO.

Damages—Fatal Accidents Act, R. S. Sask. ch. 135—Expectation of Pecuniary Benefit — Unmarried Sister of Deceased.

In an action under the Fatal Accidents Act the trial Judge awarded the unmarried sister of the deceased $1,500. The evidence upon which the Judge based his award was brought out during the cross-examination of the mother who said: "My unmarried daughter lives with me. No one else lives with us." The mother stated in her direct examination that she carried on the business of a grocer and that she could not earn her living were it not for her children.

***Held*, that the trial Judge was not justified in inferring from this evidence that the daughter assisted in carrying on the business and that, since the sister was living with her mother, the pecuniary assistance provided by the deceased would also go to the sister's support.**

***Held*, that the inferences of the trial Judge, if correct, were facts within the knowledge of the mother, and that the latter not having stated them in her evidence and not having been asked any questions concerning them by the plaintiff's counsel, there was a presumption that they were not so.**

Appeal from the judgment of LAMONT, J., 28 W. L. R. 433, in respect of the award of $1,500 damages to the unmarried sister of the deceased.

The appeal was heard by HAULTAIN, C.J., NEWLANDS, BROWN, and ELWOOD, JJ.

Tisdale, for the defendant, appellant.

F. Wilson, for the plaintiff, respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an action under Lord Campbell's Act. The learned trial Judge allowed the mother of the deceased $1,000, and an unmarried sister $1,500. From the award to the unmarried sister the defendants appeal. The only evidence upon this branch of the case was given by the mother in England, and was taken under commission, and, that evidence being in writing, this Court is in the same position to draw conclusions from it as the learned trial Judge. In Toronto General Trusts Corporation v. Manitoba Construction Co., 26 W. L. R. 130, this Court held that: "In order to sustain an action under the statute in question it is

only necessary to establish a reasonable expectation of pecuniary benefit to the parties interested if the death of the deceased had not occurred."

No evidence was given by the plaintiff to shew that the sister had any expectation of receiving assistance from her brother, and we were informed by counsel at the argument that no such claim was made by the plaintiff's counsel at the trial. The evidence from which the learned trial Judge drew the conclusion which he did was brought out on cross-examination of the mother by the defendants' counsel, and that evidence was simply: "My unmarried daughter lives with me. No one else lives with us." This is the only reference to the daughter in her evidence. In her direct examination the mother said she carried on the business of a grocer in the premises on which she resided and that she should not get a living if it was not for her children. From this evidence the learned trial Judge drew two conclusions. He says: "it seems reasonable to presume that the daughter assisted in carrying on the business," and, "as the sister was living with her mother, the pecuniary assistance provided by the deceased would also go to the sister's support." I do not think the learned trial Judge was justified in drawing either of these conclusions from the evidence. If they are correct they are facts that were within the knowledge of the mother and she could have said so in her evidence, and not having been asked any such questions by plaintiff's counsel it should rather be presumed that this was not the case. See Best on Evidence, 9th ed., p. 243.

In my opinion the only conclusion that can properly be drawn from the evidence I have referred to is that this daughter was one of the children who was helping to support her mother, and not that she was in any way supported by either her mother or brother, or had any expectation of any such support. I may say that the learned trial Judge assumed that this sister was the eldest of the family, and was about 42 years old, there being no evidence on that point. As the mother is 71 years old, and was married in 1870 it would be reasonable to presume that this daughter was of full age. I only mention this to shew that there could be no presumption that the daughter was a child who could not provide for herself.

I think the appeal should be allowed with costs.

Appeal allowed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

STANDARD TRUSTS CO. v. KARST AND GENTNER.

Vendor and Purchaser—Sale of Land—Payment out of Crop —Delivery to Elevator — Purchaser Taking Storage Tickets in Own Name — Jus Disponendi — Passing of Property—Intention—Sales of Goods Act, sec. 20, sub-sec. (5), sec. 21, sub-sec. (2).

Under an agreement for the sale of land the purchaser covenanted to pay the balance of the purchase-money by delivering to the order of the vendor at an elevator one-half of all the grain grown upon said land in each year until the whole purchase-money should be paid. Purchaser delivered a year's crop to the elevator. After a portion of the said crop was sold, purchaser told the manager of the elevator that the remainder belonged to the vendor. Purchaser hauled it out of the elevator and received storage tickets in his own name. Purchaser then assigned the tickets to vendor. A few days prior to said assignment an execution creditor of the purchaser served the elevator company with a garnishee summons in which it was claimed that the company was indebted to the purchaser in respect of the grain represented by the tickets.

Held, that the property in grain grown on the land was in the purchaser until he made delivery of the vendor's share at the elevator in accordance with the terms of the agreement of sale and that, under sec. 20, sub-sec. (5) of the Sales of Goods Act, the delivery was *prima facie* evidence of the appropriation of the amount delivered to pass the property therein.

Held, that under sec. 21, sub-sec. (2) of the Sales of Goods Act, the taking of the storage tickets by the purchaser in his own name raised a *prima facie* presumption of the reservation of the right of the disposal which might be rebutted by evidence shewing that though the purchaser took the tickets in his own name he did not intend to retain any control or interest in the property represented thereby.

The appeal was heard by HAULTAIN, C.J., LAMONT, and NEWLANDS, JJ.

C. P. Fullerton, K.C., for plaintiff, appellant.

H. C. Pope, for defendant, respondent.

The judgment of the Court was delivered by

LAMONT, J.:—The facts in this appeal are as follows:—

By an agreement in writing bearing date the 4th day of November, 1911, one Guy Cantrall purchased from O. K. McIlhenny the south half of 35-28-5, w. 3rd, paying a portion of the purchase price in cash and covenanting to pay

the remainder by the delivery to the order of the vendor at the elevator of one-half of all the grain grown upon said land in each year. McIlhenny died, and the plaintiffs were appointed administrators of his estate. In September, 1913, Cantrall threshed the grain grown on the land during that year and hauled it to an elevator owned by the Canadian Elevator Co. He first loaded a car which was sold, and he obtained the proceeds thereof. He then hauled out twelve or thirteen hundred bushels and got paid for this. He told Erskine, the manager of the elevator, that the balance belonged to the plaintiffs. This balance he hauled out and took storage tickets therefor. He then went to Winnipeg, and on October 3rd, 1913, he assigned to the plaintiffs these storage tickets, which amounted to $924. Two days before this assignment was made, namely on October 1st, the defendants served a garnishee summons upon the elevator company in which they claimed that the company were indebted to Cantrall, in respect of the grain represented by these storage tickets. An issue was directed to determine whether the Standard Trusts Co. or the defendants were entitled to the moneys still in the hands of the elevator company. The issue was tried before Smith, D.C.J., who held that there had been no division of the grain and that the property therein was still in Cantrall, and that therefore the moneys due by the elevator company therefor were garnishable. From this judgment the plaintiffs now appeal.

In Robinson v. Lott, 2 S. L. R. 276, this Court held that in the case of a lease in which a portion of the grain grown upon the premises was reserved as rent, the property in the entire crop grown was in the lessee until he made delivery of the landlord's share at the elevator in accordance with the terms of the lease, or until the grain was divided and the landlord agreed to accept his share at some place other than that provided in the lease; and in Campbell v. MacKinnon, 14 M. R. 421, Killam, C.J., in giving the judgment of the Court en Banc of Manitoba in a similar case, said:—

"The land was demised to the execution debtor, and out of the crop a certain portion was to be paid as rent. Prima facie the property in the whole until so paid over would be in the lessee. There is nothing to indicate that he was to cultivate the soil as servant, agent, bailee or other instrument of the lessor. The construction that I would give to

the instrument is that the legal property was to be in the lessee until delivered at the elevator for the lessor, but that from that time it was to be in the lessor."

The principle of these cases applies equally, in my opinion, where the relation of the parties is that of vendor and purchaser instead of lessor and lessee. Delivery of the grain at the elevator for the lessor or vendor is therefore prima facie evidence of appropriation of the amount delivered sufficient to pass the property in the grain. Sales of Goods Act, sec. 20, sub-sec. (5). That Cantrall delivered the grain in question at the elevator is admitted. The question is, did he deliver it for the plaintiff in fulfilment of his contract or for himself?

Section 21, sub-sec. (2) of the Sales of Goods Act provides:—

"(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal."

If Cantrall retained the right of disposal of the grain represented by these storage tickets, the property therein did not pass. The prima facie presumption of a reservation of a right of disposal raised by the taking of a bill of lading or other document of title in the shipper's own name is a rebuttable one, and may be rebutted by evidence shewing that though he took the tickets in his own name he did not intend to retain any control of or interest in the property represented by these tickets. In Falk v. Fletcher (1865), 144 E. R. 501, the plaintiff, who was a salt merchant of Liverpool, was in the habit of shipping salt to Calcutta for one de Mattos. De Mattos chartered a ship from the defendant and sent it to the plaintiff to be loaded with a cargo of salt. The plaintiff had placed on board 1,007 ton of salt, for which he took the mate's receipts in his own name when he learned that de Mattos had suspended payment. He then refused to load any more salt, and demanded a bill of lading deliverable to his own order for the 1,007 tons. The defendant refused, and the vessel sailed with the salt on board. The plaintiff sued for wrongful conversion by the defendant of the salt. The trial Judge instructed the jury that if they found that by delivering the salt on board the plaintiff intended to pass the property in it to de Mattos, and that the taking of the mate's receipts in his own name was a mere

accident, they might find for the defendant; but if they found that by taking the receipts in his own name the plaintiff intended to retain control over the property, they must find for the plaintiff. The jury found the plaintiff intended to keep control of the property. In appeal, Erle, C.J., said:

"The plaintiff was in reality in the position of an unpaid vendor. As agent for de Mattos, he put the salt on board a ship chartered by de Mattos, taking the mate's receipts for it in his own name. Under these circumstances, the proper question for the jury was whether when he put the salt on board he intended to pass the property in it to de Mattos, or whether he intended to keep it under his own control."

In Browne v. Hare, 7 W. R. 619, the defendant purchased a quantity of oil from the plaintiffs to be shipped f.o.b. The plaintiffs shipped the oil, but took a bill of lading deliverable to their own order. They then endorsed the bill of lading to the defendant and sent it to their broker. The ship was lost before the broker received it. The question was, had the property passed? The Court held that it had, that the taking of the bill of lading to the shippers' own order and endorsing it to the defendant was precisely the same in effect as taking the bill of lading to the order of the defendant. In appeal, the Exchequer Chamber unanimously affirmed this judgment. Erle, J., who gave the judgment of the Court, said:—

"If the bill of lading had made the goods to be delivered to the order of the consignee, the passing of the property would be clear. The bill of lading made them to be deliverable to the order of the consignor, and he endorsed it to the order of the consignee, and sent it to his agent for the consignee. The real question will turn on the intention with which the bill of lading was taken in this form—whether the consignor shipped the goods in performance of his contract and placed them free on board, or for the purpose of retaining control over them and continuing owner contrary to the contract. The question was one of fact, and must be taken to have been disposed of at the trial. The only question before the Court below, or before us, being whether the mode of taking the bill of lading necessarily prevented the property from passing—which, in our opinion, it did not, under the circumstances."

The question then is, did Cantrall, when he delivered the specific grain represented by the storage tickets, intend to pass the property to the plaintiffs, or did he intend to retain control of it himself? What his intentions were must be gathered from the evidence of Erskine, the manager of the elevator, and Cantrall himself. In his evidence Erskine says: "Mr. Cantrall delivered, I think, between forty-five hundred and five thousand bushels of grain to the Canadian Elevator Co. last fall. We first shipped a car, and the returns came to me, which I turned over to him. He also sold something like twelve hundred or thirteen hundred bushels, I should judge, by waggon for which I could not supply cars. Then he told me the balance of the grain belonged to the Standard Trust Co., and of course I knew the conditions on which he bought the place anyway before he made a settlement with me for the balance of the grain. I told him unless he had a good crop it would leave them scant. That is all I know of the transaction except when the garnishee was laid upon me of course I could not have paid any more money to him. The next thing I found out the grain had been transferred to the Standard Trust Co. at Winnipeg."

Cantrall, in his evidence, said that he told the elevator manager when he was loading the grain that one-half belonged to the Standard Trust Co. He was asked how much money he had received previous to the delivery of the grain represented by these last storage tickets—that is, those he assigned to the plaintiffs. He replied that he could not say exactly—twelve or thirteen hundred dollars, he guessed, which was more than his half share. He then was asked this question: "You had received payment before the last delivery of the grain represented by these storage tickets?" A. "Yes." He also said that when he finished delivering the grain he had Erskine figure up the tickets to ascertain the amount the plaintiffs would receive.

This evidence satisfies me that when he delivered the grain represented by the storage tickets in question to the elevator, Cantrall was unconditionally appropriating to the contract the specific grain which was then left upon his farm, and that he intended to pass the property therein to the plaintiffs. He did not, in my opinion, intend, when he took the tickets in his own name, to retain any control over them, but did intend that the whole property therein should pass to the plaintiffs. That being so, the property in the grain

passed to the plaintiffs, and the money in the hands of the elevator company is not garnishable.

The appeal should therefore be allowed, with costs, the judgment appealed from set aside, and judgment entered for the plaintiffs with costs.

Appeal allowed.

SASKATCHEWAN.

BROWN, J. NOVEMBER 21ST, 1914.

CHAMBERS.

MORIN v. DUPUIS.

Practice—Judgment in Default of Appearance at Trial—Application to Set Aside, and to Restore Action to List for Trial—Jurisdiction to Entertain—Rules 351, 620.

An application to set aside a judgment obtained by default of appearance at the trial, and to restore the action to the list for trial, may be made to a Judge of the Supreme Court or to a local master.

Appeal from the judgment of the Local Master at Weyburn dismissing an application to have a judgment obtained in default of appearance at the trial set aside and the case restored to list for trial under Rule 351.

P. H. Gordon, for plaintiff, appellant.

A. Lloyd Griffiths, for defendant, respondent.

The judgment of the Court was delivered by

BROWN, J.:—This is an appeal from the Local Master at Weyburn. This action was set down for trial at the regular sittings of the Supreme Court held at Weyburn in October. I happened to preside at that Court, and upon the case being called in its regular order the defendant appeared by counsel, but neither the plaintiff nor counsel on his behalf were present. The action was therefore dismissed. Application was subsequently made by the plaintiff to the Local Master at Weyburn to set aside the judgment so obtained and to have the case restored to the list under rule of Court No. 351. The Local Master dismissed the application on the ground that he had no jurisdiction to entertain same, and although he does not so state, I presume he was of

opinion that the trial Judge alone had such jurisdiction. Supreme Court Rule No. 351 is as follows:

"351. Any verdict or judgment obtained, where one party does not appear at the trial, may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within fifteen days after the trial."

The old Rule of Court for which 351 was substituted reads as follows:—

"256. Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or Judge upon such terms as may seem fit upon an application within fifteen days after the trial."

Under this old rule the practice was to apply to the Judge who presided at the trial. The present rule follows the wording of English Rule No. 457, and seems to differ materially from our old Rule of Court in that application may be made to "a Judge." I see no reason why the phrase "a Judge" should be restricted in its meaning to the Judge who tried the case. On its face it means, any Judge of the Supreme Court. Under the English rule it was laid down, in the case of Vint v. Hudspith, 29 Ch. D. 322, that the proper practice under that rule was to apply to the Judge who gave the judgment to restore the action. In that case the plaintiff, whose action had been dismissed in default of appearance at trial, appealed to the Court of Appeal from the judgment so obtained; and Cotton, L.J., said, in the course of his judgment:—

"I am far from saying that this Court cannot entertain an appeal from a judgment made by default, but in a case like the present it is important to prevent the Court of Appeal from being flooded by having to hear cases in the first instance. It is therefore right that the plaintiff should first apply to the Judge who gave the judgment to restore the action. It cannot be said that the plaintiff did not know that the action was going on against him. He has only himself to thank for all the difficulty that has occurred. The appeal must stand over for a fortnight, to give time for the plaintiff to make such application to the Judge as he may be advised."

The point emphasized in the judgment is that the proper practice is, not to appeal from the judgment, but to apply in the first instance to the lower Court to restore the action. There is nothing in the judgment itself to indicate

why special reference was made to the Judge who gave the judgment. The reason will, I think, be found in the English practice. There, as I understand it, each case is assigned to a particular Judge to deal with, and all applications, interlocutory and otherwise, made in, as well as the trial of, the action are disposed of by the particular Judge to whom the case is thus assigned. There is no such practice here. On the contrary, with us the trial Judge, as a rule, never hears of the case until he is called upon to try it. Moreover, to so restrict the rule would, in my opinion, cause much inconvenience under our practice.

I am therefore of opinion that any Supreme Court Judge in Chambers had jurisdiction to entertain this application; and, that being so, the Local Master would have jurisdiction under Rule 620.

The appeal will therefore be allowed with costs; the judgment in question will be set aside, and the action restored to the list for trial at the next regular sittings of the Court to be held at Weyburn. The plaintiff must pay the defendant his "costs of the day" on the trial of the action, including a counsel fee of $40, and his costs of the motion to the Local Master. The plaintiff's costs of this appeal will be offset against the costs which he is so ordered to pay the defendant, and the plaintiff will pay the defendant any difference.

Appeal allowed.

SASKATCHEWAN.

LAMONT, J. NOVEMBER 28TH, 1914.

CHAMBERS.

PEASE v. TUDGE.

Execution—Sale of Mortgage—Unreasonable Price—Duty of Sheriff.

Where a sheriff selling under execution cannot obtain a reasonable price, it is his duty to make a return that the goods and chattels seized remain in his hands unsold for want of buyers.

An application to confirm the sale of a mortgage made by the Sheriff under execution.

H. Y. MacDonald, K.C., for plaintiff.

A. G. MacKinnon, for defendant Tudge.

LAMONT, J.:—The facts are as follows: The plaintiff, having obtained a judgment against L. T. Tudge, and Sarah Tudge, his wife, issued execution thereon on January 5th, 1911, for $92.25. The execution was duly filed in the land titles office. At that time Sarah Tudge was the owner of a mortgage for $2,265 on the north-west quarter of 13-15-1, w. 2nd, made by Albert Schwalm to her. She had sold the quarter section to Schwalm, and had received the mortgage back. The mortgage was subject to a prior mortgage of $1,800. The value of the land covered by the mortgage I find to be $6,500. In May, 1913, the sheriff made seizure of the mortgage belonging to Sarah Tudge. He advertised the mortgage for sale by posting a notice of sale in his own office and in the office of the local registrar and six other places in Moosomin. On June 21st he offered the mortgage for sale. There were no bidders present. On June 28th he again offered it, with a similar result. On July 5th he again offered it, on which occasion he received an offer of $100 from A. T. Proctor, and sold the mortgage to him for that sum. On the application to confirm the sale, counsel for Mrs. Tudge offered to pay the amount of the execution, interest, and all costs to date. This was refused. The affidavit of Mrs. Tudge shews that since January, 1911, she has been living in British Columbia, and that the first information she received that the mortgage had been seized was the notice of motion to confirm the sale. It also shews that at the time the mortgage was seized there was due to Mrs. Tudge from the mortgagor far more than enough to satisfy the execution and costs.

I am of opinion the application must be refused. The duty of a sheriff in selling property seized under execution is laid down in Halsbury's Laws of England, volume 14, p. 56, as follows:

"It is the duty of the sheriff within a reasonable time after seizure to sell the goods for a reasonable price."

And he cites as authority for that proposition the case of Keightley v. Birch, 3 Campbell, 521, the headnote of which in part reads:

"The sheriff, having taken goods in execution under a fi. fa., is not justified in selling them to the highest bidder, but if he cannot obtain a reasonable price should return that they remain in his hands for want of buyers."

In giving judgment in that case, Lord Ellenborough said:—

"If the goods taken in execution were really worth £300 or £400, I think the sheriffs are liable for selling them at £72, 15s. 10d. The return ought to have been that they had taken goods which remained in their hands from want of buyers. If a chattel worth a thousand pounds is put up for sale and only five pounds bid for it, the sheriff ought not to part with it for that sum, and he may fairly say that it remains in his hands for want of a buyer. He ought to wait for a venditione exponas, the meaning of which is, "Sell for the best price you can obtain."

A return by a sheriff that goods and chattels seized remain in his hands unsold for want of buyers is applicable not only to a case where no bids have been made for the goods, but also where no offer is made of a sum reasonably approaching their value. 14 Hals. 58 & 59. I am therefore of opinion that the sheriff should not have sold a mortgage worth $2,200 for $100, but that he should have made a return that the mortgage remained on his hands for want of buyers. If, then, the execution creditor desired, I am of opinion that, following the English practice, he should have made an application for an order directing the sheriff to sell for the best price he could obtain. This order would be obtained upon personal notice to Mrs. Tudge, and if upon such notice being given and the order being made. Mrs. Tudge did not pay off the execution or find someone to purchase the mortgage at a reasonable figure, she could not complain if a reasonable price was not obtained for the mortgage.

As pointed out by Lord Ellenborough in Keightley v. Birch (ante), sheriffs may often find themselves in difficult positions in which they must act at their peril. Cases may arise in which a sheriff may be honestly in doubt as to whether the price offered is a reasonable one or not. In such cases I take it that if there was any reasonable evidence on which a Court could hold that a reasonable man would have reached the same conclusion as the sheriff, the course followed by the sheriff would be upheld. In the present case no one can say that $100 is a reasonable price for a mortgage which is a security for over $2,200 on property worth $6,500 on which there is only a prior incumbrance of $1,800. Furthermore, having seized the mortgage, and there

being more than enough due from the mortgage to satisfy the execution and costs, I cannot see why the sheriff could not have collected from him sufficient to pay off the judgment.

The application will, therefore, be refused.

Application refused.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

POWELL v. SASKATCHEWAN LAND CO. LTD. ET AL.

Practice—Appointment of Receiver by Master-in-Chambers —Application to Continue—Jurisdiction of Judge-in-Chambers to Entertain—Rule of Court 130.

Under Rule 130 of the Saskatchewan Rules of Court a Judge-in-Chambers has jurisdiction to entertain an application to continue the appointment of a receiver made with the consent of the defendant by the Master-in-Chambers.

The application was heard by HAULTAIN, C.J., BROWN, and ELWOOD, JJ.

C. W. Hoffman, for applicant.

The judgment of the Court was delivered by

BROWN, J.:—This is an application to continue the appointment of the National Trust Company, Limited, as receiver. This company was appointed as such for a limited time by the Master in Chambers. An application was then made to a Judge in Chambers to continue the appointment, and as the Judge expressed some doubt as to his power as a Judge in Chambers to make the order, a motion at his suggestion was made direct to this Court The statement of claim shews that in this case the main item of relief sought is the appointment of a receiver, and the National Trust Company, Limited, are mentioned in the claim as the parties to be appointed. The defendants have not appeared to the action, and I judge from the material on file that they are quite satisfied that the appointment should be

made. There can be no question as to the power of this Court to make the order asked for, and under the circumstances it should, in my judgment, be made, as the plaintiff should not be delayed longer in getting his relief. I think it should be stated, however, that the plaintiff's proper course was to have had his application dealt with by a Judge in Chambers in the ordinary way, and to have come before this Court by way of appeal. It seems advisable that any doubt as to the proper practice should be removed. I am of opinion that under our rule of Court No. 130 the Judge in Chambers had jurisdiction in this matter. This rule is very general in its scope. It stipulates that in all cases not otherwise provided for where there has been default in appearance, the plaintiff may apply to a Judge in Chambers for judgment. There is no rule under the English practice similar to this. As the appointment of a receiver was, as already intimated, a portion of the relief sought for in the statement of claim, application to a Judge in Chambers, in my opinion, would come within the scope of the rule. The order should therefore go, and, as the trust company is one approved of by the Government, their appointment should be continued without the necessity of security being furnished. The plaintiff should have leave to apply to a Judge in Chambers for such further relief as he may at any time desire and be entitled to.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

BROWN v. MOOSE JAW ELECTRIC R. W. CO.

Negligence—Collision Between Street Car and Waggon at Crossing—Passenger on Car Injured—Breach of Rules Regulating Traffic — Right of Public to Assume Compliance with — Non-Suit Refused — Finding of Jury — Damages—Reduction of Amount of Special Damages.

The plaintiff who was a passenger on a street car was injured in a collision between the car and a waggon crossing the street in front of it. By agreement between the Street Railway Company and the City Corporation it was agreed that the cars should not be propelled at a higher rate of speed than 10 miles an hour within the city limits, without the consent of the corporation, and the instructions to the employees of the railway company required the gong to be sounded within 25 yards of a street crossing.

Held, that the driver of the waggon had a right to assume that the driver of the car would observe the above rules regulating the traffic of the streets, and that therefore, there was evidence of negligence on the part of the railway company to go to the jury and to support their finding that the accident was caused by the negligence of the motorman of the railway company's car in running at an excessive rate of speed, and not ringing his gong at the proper time.

Simington v. *Moose Jaw Street R. W. Co.*, 26 W. L. R. 167, followed.

Held, that the Supreme Court *en banc* could reduce special damages to the amount proved at the trial.

Stoats v. *C. P. R.*, 27 W. L. R. 627, followed.

W. B. Willoughby, K.C., for defendants, appellants.

C. J. Lennox, for plaintiff, respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—The female plaintiff was a passenger on one of the defendant company's street cars in Moose Jaw, and was injured in a collision between that car and a waggon crossing the street in front of the car. The plaintiffs allege negligence on the part of the defendants, which the latter deny. The defendants also deny that the female plaintiff's injuries were caused by the accident. At the end of the plaintiff's case the defendants' counsel moved to dismiss the action, on the ground that no negligence on the part of the defendants had been proved, but that the accident was caused by the driver of the waggon which was

struck by the street car. The trial Judge refused to dismiss the action; and the jury found that the accident was caused by the negligence of the motorman of the defendants' car in running at an excessive rate of speed, not ringing his gong at a proper time, and also that the motorman was incompetent from lack of experience in handling his car. Judgment was entered for the plaintiff. From this finding the defendants appeal on the ground that the plaintiff's evidence was not sufficient to place the defendants on their defence, that is, the jury could not reasonably come to the conclusion they did from the evidence, and that the jury should have found that the accident was occasioned entirely by the driver of the waggon run into by the car, and that therefore the defendants were not liable.

The accident occurred on Coteau street. Prime, the driver of the wagon, was proceeding from 9th Avenue west along Coteau street with the intention of turning into Scott street along Coteau street, the distance is 216 feet. The street car came from 10th Avenue, and ran west on Coteau street. The distance from 10th Avenue to Scott street is 1,406 feet, or from the centre of one street to the other, an additional 66 feet, or a total of 1,472 feet. When Prime turned into Coteau street he looked east and there was no street car on Coteau street. When he turned to cross the street at the east corner of Coteau street he did not look again because, not having seen a car when he turned into Coteau street, he thought he could safely cross the street car track, going at the rate he was, from 2⅓ to 3 miles an hour, and particularly as he had heard no gong sounded. His horses got across the car tracks, but his waggon was struck by the car, and the impact of the two threw the female plaintiff off her seat and caused the injuries complained of. Her evidence is to the effect that the street car was going very fast. Taking Prime's speed at the lowest figure he has given, 2½ miles an hour, and the distance he travelled to the point of the collision, 216 feet, the defendants' car would have to have gone at a rate at least seven times faster, or 17½ miles an hour, to have covered the distance that car had to go—1,472 feet—in order to arrive at that point at the same time.

A copy of the agreement between the defendant company and the city of Moose Jaw was put in at the trial, which provided: "2. The cars shall not be propelled at a

higher rate of speed than ten (10) miles an hour within the city limits, without the consent of the corporation," and no such consent was proved; and rule 55 of instructions to street railway employees was also put in, requiring the gong to be sounded within 25 yards of a street crossing.

In Simington v. Moose Jaw Street Railway Co., 26 W. L. R. 167, this Court decided, following Toronto Railway Co. v. King, [1908] A. C. 25, that a driver of an auto, the plaintiff in that case, had a right to assume that the driver of a street car would observe the rules regulating the traffic of the streets. In my judgment in that case, at p. 168, I said: "By an agreement between the corporation of the city of Moose Jaw and the defendant company, under which the said company was given a franchise to operate their street railway in the city of Moose Jaw, it was provided that the company should not run their cars at a greater speed than ten miles an hour without the permission of the city (and no evidence was given that any such permission had been granted), and that the gong should be sounded within fifty feet of each crossing." And at p. 171: "The plaintiff in this case had, therefore, the right to assume that the defendants' street car would be travelling not more than ten miles an hour and would sound the gong when fifty feet from the crossing, and, not hearing the gong, he was not guilty of 'folly and recklessness' in attempting to cross Main street. If the car had been travelling at a proper rate of speed he could have crossed safely." This language applies with equal force to this case, and there was therefore evidence of negligence on the part of the defendants to go to the jury and to support their finding.

The injury caused to the female plaintiff was a complete prolapse of the uterus, which could only be cured by one, and perhaps two, major operations. She had previously suffered from a partial prolapse. The jury awarded her $4,000, which amount is claimed by the defendants to be excessive: they also contend that the evidence shews that the prolapse was not caused by the accident. On this latter point I will only point out that two medical men swore that the complete prolapse was caused by the accident, and two others that it could not have been so caused. It is, therefore, properly a question for the jury, and their finding is one that we should not interfere with.

As to the damages being excessive, the only evidence was that the operations she would have to undergo might cost up to $5,000 and that they might be fatal. Under these circumstances I cannot say the amount is excessive.

Special damages were also claimed by the male plaintiff, and were assessed at $243 in addition to $150 general damage allowed him. Expenses for medical services and drugs were proved amounting to $83.70, and loss of revenue from boarders was claimed at $140, which I presume the jury also allowed, these expenses having been called to their attention by the trial Judge in his charge. Together these amounts make only $223.70. These special damages should therefore be reduced to this amount. We held in Staats v. C. P. R., 27 W. L. R. 627, that this court could reduce special damages to the amount proved at the trial.

The appeal in this case should be dismissed with the provision that the verdict be amended as above. I think the plaintiff should have the costs of appeal.

Appeal dismissed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

NEVILLE v. MACMILLEN.

Practice — Right to Sign Judgment in Default of Defence During Pendency of Application for Summary Judgment —Rules of Court 102, 135, 224.

A plaintiff has no right to sign judgment in default of the delivery of a defence while an application for summary judgment is pending.

An appeal from the judgment of the district court judge at Kerrobert, dismissing a motion to set aside a judgment signed in default of the delivery of a defence, while an application for summary judgment was pending.

The appeal was heard by HAULTAIN, C.J., BROWN, and ELWOOD, JJ.

J. A. Allen, K.C., for defendant, appellant.

J. M. Hanbidge, for plaintiff, respondent.

The judgment of the court was delivered by

BROWN, J.:—The plaintiff brought action against the defendant on a certain promissory note, and the defendant duly entered an appearance on the 3rd day of July last. On the 7th July the plaintiff served a notice of motion for an orler striking out the defendant's appearance and for leave to sign summary judgment against the defendant for the amount of the plaintiff's claim. This motion was made returnable for July 13th, and allowed to stand until the 14th. On this latter date the plaintiff's counsel, on the matter being spoken to, abandoned the application, stating that the plaintiff had already signed judgment in default of defence being delievered. The defendant had not filed or delivered any defence, and on July 14th the plaintiff had signed judgment against him for the full amount of his claim and costs. This judgment was signed while the motion for summary judgment was still pending. The defendant applied to the district court judge to set aside the judgment so entered, and the judge, who held that the plaintiff was within his rights in so signing judgment, set aside the judgment allowing the defendant to defend, but ordered the defendant to pay the plaintiff's costs of motion. The plaintiff justifies his action under Rules of Court 102 and 224. Rule 102 requires the defendant in an action, if he wishes to defend, to enter an appearance and within six days thereafter file his defence, and Rule 224 provides that in the event of the defendant failing as aforesaid the plaintiff may enter final judgment for the amount of his claim and costs. The question is to what extent, if any, has the plaintiff affected his right to so sign judgment under these rules by making his application for summary judgment. That application is made under Rule of Court 135, which provides that upon the defendant entering an appearance the plaintiff may, on affidavit proving his claim and stating that in his belief the defendant has no defence to the action, apply to a judge-in-chambers for liberty to enter final judgment. In answer to such an application, the rule itself requires that the defendant must satisfy the judge that he has a good defence or disclose such facts as may be deemed sufficient to entitle him to defend. The plaintiff, by making such an application, says in effect that the defendant has no defence to the action and should not be allowed to file a defence to same. So we have on the one hand the plaintiff applying to the

judge for judgment on the ground that the defendant can have no defence to the action, and on the other hand, while this motion is still pending before the judge, he applies to the clerk of the court for judgment against the defendant because he has not filed a defence. Such a practice was surely never contemplated by the rule. The plaintiff, by applying to the judge for summary judgment, in effect said to the defendant, "While this motion is pending you not only need not but must not file a defence." I am clearly of the opinion that in view of the motion, and while the motion was pending, the plaintiff had no right to sign judgment in default of delivery of defence, and that therefore the judgment in question should be set aside. In Odgers on Pleading, 6th ed., at p. 229, the following statement is made:

"Where the writ is specially endorsed under Order III., r. 6, the defendant must deliver his defence either ten days from the last day on which he could have entered an appearance—unless in the meantime the plaintiff serves on him a summons either for directions or for judgment under Order XIV. As soon as the defendant is served with either of these summonses, he must hold his hand and deliver no defence until the summons is disposed of, even though the prescribed time for delivering the defence will expire before the summons is returnable. (Hobson v. Monks (1884), W. N. 8). By taking out such summons the plaintiff practically extends the time for delivery of the defence."

The case of Hobson v. Monks, cited by Odgers, is not available to me, but it is also referred to in the Annual Practice under English Rule 239 for the same proposition.

In the result the appeal in my opinion should be allowed with costs, and the judgment varied by directing the costs of the motion to be paid by the plaintiff.

Appeal allowed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

ROGERS LUMBER CO. v. DUNLOP.

Chattel Mortgage—Renewal Under Order of Judge—Renewal Statement Filed Prior to Issue of Executions—Validity of Mortgage Against Executions—Sec. 28 of Bills of Sale Act—Effect—Increase of Live Stock—Description—Renewal Statement—Sufficiency of.

Where an order is made, under the Bills of Sale Act, to file a renewal statement subsequently to the date fixed by the Act, and that renewal statement is filed, the mortgage retains its validity, under sec. 25 of the Act, and is only void as against those who have acquired rights during the interval between the date upon which the renewal should have been filed and the date upon which it was actually filed.

A creditor must become an execution creditor within the said period in order to acquire any rights against the mortgagee.

The description of the mortgaged property is sufficient if the property can be identified from it.

It is immaterial that a renewal statement does not contain the surname of the mortgagee or the additions of the mortgagor and mortgagee so long as the mortgage referred to in it can be identified.

An appeal from the judgment of a district court judge upon the trial of an interpleader issue.

The appeal was heard by LAMONT, BROWN, and ELWOOD, JJ.

G. H. Barr, for claimant, appellant.

H. J. Schull, for plaintiffs, respondents.

The judgment of the Court was delivered by

ELWOOD, J.:—This is an interpleader matter in which the learned district court judge held that the chattel mortgages covering the goods seized by the sheriff were void as against the execution creditors. There were two chattel mortgages, both of which were given prior to the issue of the executions. The first chattel mortgage in point of time was not renewed on the date required by the Bills of Sale Act, but subsequently was renewed under an order made by the district court judge under the provisions of that Act,

and this renewal was filed prior to any of the executions issuing. It was contended that the execution creditors having, prior to the date of the filing of the renewal, been creditors, although not execution creditors, of the mortgagor, the mortgage was void as against them. I am of opinion that this contention is not well taken. The effect of section 25 of the Bills of Sale Act is that where an order is made to file a renewal statement subsequently to the date fixed by the Act, and that renewal statement is filed, the mortgage retains its validity and is only void as against those who have acquired rights during the interval between the date upon which the renewal should have been filed and the date upon which it was actually filed. The execution creditors in this instance did not acquire any rights during that period. The only way in which they could have acquired rights would have been by taking out execution. This was not done, and therefore the renewal as against them preserves the rights of the mortgagee.

The property covered by the mortgages with respect to which the contention in this matter arises consists, inter alia, of: 31 red poll cows, 6 red poll yearling heifers, 2 red poll yearling steers, and 20 red poll calves. In the first mortgage there is the description, "Registered in Red Poll Herd Book of America," and then the name given, and then the number; and "sixteen calves." In the second mortgage the cows are described as "the red polled cow," then the name of the cow is given, and then, following that, "American Registry No.," and a number given after the cow: "10 red polled heifers one year old," "10 red polled calves, heifers, one year old." Both mortgages contain a description of the land upon which these goods are situated, which is the land upon which the goods were seized by the sheriff; and contain the following:

"And also all and singular all the increase of any and all of the live stock above mentioned and described (etc.), and also all and singular any and all live stock of any and every description which may hereafter, during the currency of these presents and until the same are fully paid off and satisfied, be at any time purchased or got by the mortgagor, and in his possession upon or about the aforesaid lands and premises, or brought thereon, either in addition to, renewal of, or in substitution for any of the aforesaid live stock.

And also any and all live stock hereafter purchased or acquired by the mortgagor during the currency of these presents or any renewal or renewals thereof."

So far as the 31 red poll cows are concerned, I am of the opinion that the description in both mortgages is quite sufficient. They are described as of a certain breed, we can assume from the description that they are red, and the name and location in each case are given. In the argument before the district court judge apparently a good deal turned upon the question of what the red poll book of America would contain. That does not seem to me at all material. As I said above, the description is given, and from that description the goods could be ascertained. As was said by Ritchie, C.J., in McCall v. Wolfe, 13 S. C. R. 133, "there need not be such a description as that, with the deed in hand, without other inquiry, the property could be identified. But there must, in my opinion, be such material on the face of the mortgage as would indicate how the property may be identified if proper inquiries are instituted." See also Hovey v. Whiting, 14 S. C. R. 515; Connell v. Hickock, 15 O. A. R. 518; Western Milling Co. v. Darke, 2 Terr. L. R. 40; Hickley v. Greenwood, 25 Q. B. D. 277. The first mortgage was dated the 16th December, 1911, and the second one on the 7th April, 1914. The seizure in question was on the 27th July, 1914, and therefore the six red poll yearling heifers, the two red poll yearling steers, and the 20 red poll calves could not have been in existence, and therefore, not in the possession of the mortgagor, at the date of the first mortgage. As stated above, the first mortgage contains provisions for including after-acquired property in the mortgage, and I am of the opinion that these provisions are sufficient to include the six red poll yearling heifers, the two red poll yearling steers, and the 20 red poll calves, and that the claimant is entitled to claim them under that provision. Joseph v. Webb et al., 1 C. & E. 271; Barron & O'Brien, 2nd Rev. ed., 147 and 148.

A number of objections were raised to the validity of the second mortgage, but in view of the conclusion I have come to with respect to the first mortgage it is not necessary that I should decide these objections, because counsel for the appellant intimated on the argument that if we should hold that the first mortgage was valid, it would be unneces-

sary to decide the questions raised with respect to the second mortgage.

It was objected further that the renewal statement did not contain the surname of the mortgagee or the additions of the mortgagor and mortgagee. The statement and the affidavit verifying the statement sufficiently identify the mortgage that is referred to, and that, in my opinion, is quite sufficient.

The result, in my opinion, is that the claim of the claimant to the goods claimed under the chattel mortgage of December 16th, 1911, should be allowed, and his claim barred under the mortgage of April 9th, 1914. The execution creditor should pay the claimant his costs of the interpleader proceedings and of this appeal.

THE

Western Law Reporter

VOL. XXX. TORONTO, JAN. 25, 1915. No. 5

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

RADOWITCH v. PARSONS.

Verdict of Jury—Given in Answer to Questions—Power of Appellate Division of Supreme Court to Set Aside — Rule 326.

Plaintiff, who was in the employ of defendant, was in charge of blasting operations on work which was being carried on by defendant in the construction of a railway. Defendant supplied plaintiff for some time with a fuse which had been subjected to moisture and did not burn as rapidly as a dry fuse. Subsequently defendant supplied plaintiff with a dry fuse which burned more rapidly, and as a result a shot which the plaintiff was setting off ignited sooner than plaintiff anticipated and the explosion injured him. The following questions were submitted to the jury: (1) "Were the plaintiff's injuries caused by negligence on the part of defendant, Parsons? (2) If so, in what respect was he negligent?" The answer to the first question was: "No, we find there was no direct negligence on the part of defendant, Parsons." The answer to the second question was: "No." The foreman of the jury explained that the word "direct" might have been left out, that the jury simply meant to convey that defendant was not responsible for negligence. No evidence was given at the trial for defendant.

Held, BECK, J., dissenting, that the plaintiff was neither entitled to have the verdict set aside as perverse nor to a new trial.

Per STUART, J.:—Rule 326 giving the Appellate Division of the Supreme Court "power to draw inferences of fact and to give any judgment and make any order which ought to have been made" means any inference, order, or judgment, which ought to have been made by the judge below and does not confer power upon the Appellate Division to place itself in the position of a jury, give a verdict, and enter a judgment thereon.

Per SIMMONS, J.:—A special verdict cannot be set aside by the Appellate Division as perverse unless it is shewn that the evidence is such that no jury could properly find a different verdict than that entered by the said court.

Per BECK, J. (dissenting):—Under Rule 326 the Appellate Division of the Supreme Court has power to set aside a special verdict which is against the evidence and to enter judgment for the opposite party.

An appeal from the judgment of SCOTT, J., entered in favour of defendant upon a special verdict given in answer to questions in an action for damages for injuries received by plaintiff while in the employ of defendant, through the alleged negligence of the latter.

The appeal was heard by BECK, SIMMONS, and STUART, JJ.

M. M. Charleson, for plaintiff, appellant.

S. W. Field, for defendant, respondent.

STUART, J.:—This is an appeal by the plaintiff in which he asks the Appellate Division to set aside a judgment for the defendant entered by the trial judge in favour of the defendant in consequence of an answer by the jury that the defendant had not been guilty of negligence and in which he asks further that judgment be now directed to be entered in his favour for the sum of $750 being the amount at which the jury assessed the damages suffered by him in consequence of the accident, or for a new trial.

No evidence was given at the trial on behalf of the defendant. It is suggested that the Appellate Division has power to do what is asked by the appellant by virtue of a provision of Rule 326 which states that: "The court shall have power to draw inference of fact and to give any judgment and make any order which ought to have been made."

The effect of a similar British Columbia Rule was considered by the Supreme Court of Canada in McPhee v. Esquimalt and Nanaimo Ry. Co., 49 S. C. R. p. 43. In that case Mr. Justice Duff said:—

"By the law of British Columbia, the Court of Appeal in that province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence.

"The power given by Order 38, Rule 4, to draw inferences of fact and to make such further or other order as the case may require, enables the Court of Appeal to give judgement for one of the parties in circumstances in which the court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial judge would be to give effect to the

verdict; while, in the Court of Appeal, judgment might be given for the defendant if the court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.

"This jurisdiction is one which, of course, ought to be and, no doubt, always will be exercised both sparingly and cautiously: Paquin v. Beauclerk, [1906] A. C. 148, at p. 161; and Skeate v. Slaters, 30 Times L. R. 290."

In Paquin v. Beauclerk, [1906] A. C. 148, Lord Loreburn, L.C., referring to the corresponding English Rule said: "Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet if the evidence be such that only one conclusion can properly be drawn I agree that the court may enter judgment. The distinction between cases where there is no evidence and those in which there is some evidence though not enough properly to be acted upon by a jury is a fine distinction and the power is not unattended with danger. But if cautiously exercised cannot fail to be of value."

It is to be observed, however, that in Paquin v. Beauclerk what had been done by the Court of Appeal was to enter a judgment for the defendant and this was affirmed in the House of Lords by an equal division; while in McPhee v. Esquimalt and Nanaimo Ry. Co. all that was done was to send the case back for a new trial.

In Toulmin v. Millar, 12 A. C. 746, the jury had found a verdict for the defendant. The Court of Appeal entered judgment for the plaintiff for a certain sum. In the House of Lords, Lord Halsbury said: "I only wish to add that if I entertained a different view of the facts I should be unable to concur with the course pursued by the Court of Appeal. It becomes unnecessary in the view which I take to pronounce any absolute judgment in the matter but I doubt very much whether Order LVIII. Rule 4 gives any such jurisdiction as the Court of Appeal claimed to exercise in finding a verdict for themselves and actually assessing damages for breach of a contract. As I think the judgment of the Court of Appeal was wrong upon the facts, it is not absolutely necessary to determine that question."

In Hamilton v. Johnston, 5 Q. B. D. 263, the court acted upon a different rule from that which is invoked here and in any case, the original judgment was for the plaintiff and

all that the Court of Appeal did was to restore that judgment after it had been set aside by a Divisional Court.

Campbell v. Cole, 7 Ont. Rep. 127, was a similar case. It was decided under the same rule as Hamilton v. Johnston, ubi supra, and in any case all it did was to set aside a verdict for the plaintiff in an interpleader issue and direct judgment to be entered for the defendant.

I have been unable to find any case, except Toulmin v. Millar, in which, under such a rule as we have here, a Court of Appeal has undertaken to set aside a jury's verdict for the defendant and to enter one for the plaintiff.

There does come to my memory a British Columbia case, in which, I think, it was done, though I cannot now discover it and moreover I am under the impression that it was reversed at Ottawa. With regard to Toulmin v. Millar, I cannot take it as of much weight as an authority, in view of Lord Halsbury's criticism above quoted.

In Paquin Ltd. v. Beauclerk, from which I have quoted the remarks of Lord Loreburn, there was a disagreement by the jury, and Laurence, J., the trial judge, entered a judgment for the plaintiffs. The Court of Appeal merely reversed the decision and entered a verdict for the defendants, a result which was upheld on an equal division in the House of Lords. The words of Lord Loreburn, therefore, cannot be taken as an express authority for the proposition that, in the face of a jury's verdict for a defendant, a Court of Appeal may enter a verdict for the plaintiff.

In Allcock v. Hall, [1891] 1 Q. B. D. 444, all that was done was to set aside a verdict for the plaintiff and dismiss the action, that is, to enter a judgment for the defendant.

In Skeate v. Slaters Limited, [1914] 2 K. B. 429, Phillmore, L.J., cites, at p. 445, what he believes to be all the cases decided upon the point, and, on examination of them, there does not appear to be any, except Toulmin v. Millar, in which the court ever went so far as we are asked to go here. They all, with that exception, present the case of setting aside a verdict for the plaintiff, which is a very different matter. The case which I have just referred to contains the most recent and a very exhaustive discussion of the meaning of the rule. It was an action for damages brought by a customer at a restaurant against the proprietors for supplying him with unwholesome food whereby he

had been made ill. At the conclusion of the plaintiff's evidence, Lawrence, J., refused to withdraw the case from the jury, although he thought the evidence was very meagre. After the defendant had also adduced evidence, the judge again refused to withdraw the case. The jury disagreed. Lawrence, J., then refused to enter judgment dismissing the action, and from this refusal the defendant appealed. The case, therefore, does not bring up the exact point now under consideration. Lord Reading, C.J., in his judgment, refers to Toulmin v. Millar, Allcock v. Hall and Paquin Limited v. Beauclerk, but, after all, he only concludes that the court has power, and ought, on a proper case, to enter judgment for a defendant. The judgment of Buckley, L.J., is also confined to the power to do that much, as will be seen by his words, at p. 439, where he says: "We are entitled upon the evidence as a whole to say whether the evidence is such as that twelve reasonable men could properly arrive at the conclusion that the plaintiff was entitled to a verdict and we are of opinion that they could not. The court has, I think, full power to enter judgment for the defendants, not because they find facts, for that is the province of the jury, but because they find that there are not facts sufficient to support a verdict in favour of the plaintiff. If, in this case, the jury had found a verdict for the plaintiff and the application had been for a new trial or for judgment, the court would certainly have had power, if it thought right to enter judgment for the defendants."

And, again, in referring to Toulmin v. Millar, he says: "That decision as to the jurisdiction of the court was criticized by Lord Halsbury in the House of Lords, but his criticism was made upon the footing, not that the Court of Appeal were saying as we are here asked to say, that the plaintiff failed, but that they were giving an affirmative judgment in the plaintiff's favour, thus, as he says, claiming to exercise a right to find a verdict themselves and assess damages. That criticism has no bearing upon the power of the court to do that which is in question here, namely, not affirmatively to give any relief but negatively to say that no case for relief has been made out."

These words express very clearly the seriousness of the step taken by the Court of Appeal in Toulmin v. Millar and which we are asked to take here. It is true that there are expressions in the judgment of Phillimore, L.J., in the same

case, for example at page 446, which would appear to suggest a jurisdiction in a proper case to do what was done in Toulmin v. Millar, but after all the facts remain that Toulmin v. Millar is the only case in which it has been done, at least in the English courts, that the course adopted was criticized by Lord Halsbury and that the words of Lord Loreburn in Paquin v. Beauclerk, so far as they touch the present point, are obiter. Mr. Justice Duff in McPhee v. Esquimalt and Nanaimo R. W. Co. also confines his declaration of the court's power under the rule to the case of entering a verdict for a defendant.

I do not think a decision of the English Court of Appeal is in any case binding on this court, any expressions to the contrary by the Privy Council being really an exercise of a legislative, and not a judicial, function. And where the decision has the criticism of Lord Halsbury I do not think we ought necessarily to follow it.

I think the words of Rule 326 should be particularly observed. The court (meaning the Appellate Division) is given "power to draw inferences of fact and to give any judgment and make any order which ought to have been made."

Now surely those words mean "which ought to have been made by the judge below." A jury does not give a "judgment," neither does it make an "order." A jury answers questions directed to it or renders a general "verdict." That the word "judgment" in the rule does not include "verdict" is clear from a consideration of the terms of Rule 321 which says that "notice of appeal shall be given within twenty days . . . in the case of a finding or verdict after the judgment or order founded thereon has been signed and entered or issued." Obviously there is intended a distinction between the verdict of a jury and the judgment founded thereon. The final words of the sentence in Rule 326, viz.: "and to make such further or other order as the case may require," do not advance the matter at all in my opinion because they are clearly only ancilliary to the previous phrases. I can therefore see nothing in the rule which gives the Appellate Division power to place itself in the place of the jury itself, give a verdict, and enter judgment thereon.

The old time common law jurisdiction to enter a judgment for the defendant for lack of any evidence at all is a different matter. The court in such a case merely says that

there is no evidence upon which a jury can reasonably act at all but what is suggested now is that the court shall say that there is evidence, that the jury must take a certain view of that evidence or otherwise we shall ourselves reject that view, place ourselves in the jury's place, give a verdict and enter judgment thereon. I am unable to conclude that any such power is in any case intended by the rule. An ample meaning may be given to it without going that far. If the verdict of a jury was intended to be included then there was no reason why it could not have been mentioned separately and distinctly as was done in Rule 321. Again in Rule 337 we find a full use of all necessary words. It speaks of "a judgment, order, decision, finding or verdict appealed from," when it was thought right to use other words than "judgment" or "order" it was apparently easy to do so. And with regard to Rule 337 of course a "finding," "decision' or "verdict" may be "appealed from" and may be set aside but that does not necessarily involve the substitution of another finding or verdict in its place for a new trial may be granted under Rule 328. If any such grave increase in jurisdiction had been intended I think clear and express words should in any case have been used. If the jurisdiction exists then I fear that to most minds it will often mean little else than the right to accept a jury's verdict when it pleases us and to give one ourselves if it does not.

I think therefore that the most we could do in the present case is to act under Rule 328 and give a new trial. That I think is the extreme limit to which we have any power to go. In Sydney Post Publishing Co. v. Kendall, 43 S. C. R. 461, the Supreme Court of Canada upheld a decision of the Supreme Court of Nova Scotia by which a verdict for a defendant in a libel action was set aside and a new trial ordered. The court seems to have been unanimous in concluding that where it is clearly impossible that a jury of reasonable men could fairly reach any other conclusion than that the article was libellous, a Court of Appeal may set aside the verdict and (not give a verdict for the plaintiff for that was not suggested perhaps because there was no such rule in Nova Scotia as we have here) direct a new trial. The disagreement in the Supreme Court was only upon the point whether a jury of reasonable men could fairly conclude that the article was not libellous. Davies and Duff, JJ., thought

they could and that the verdict should not have been disturbed. Girouard, Idington and Anglin, JJ., thought they could not and that the order for a new trial should be upheld. The case is a good example of how difficult a task the court undertakes when it ventures to say that no jury of reasonable men could fairly find a verdict for the defendant. In many cases, and the present is one of them, the task becomes more hazardous because while in that case it was only a question of the meaning of an admitted publication we have here the possibility that the jury may really have disbelieved some things testified by the plaintiff's witnesses.

There is no doubt, however, that we could in view of the decision in the last case I cite order a new trial if we were prepared to say that upon the evidence no reasonabble jury could have done anything else than find the defendant guilty of negligence. But for myself I am not prepared to take that view of the evidence. What amounts to negligence or absence of reasonable care is a question which a jury of six ordinary every day men are peculiarly qualified to decide because it amounts to the fixing of a standard for the ordinary reasonably prudent man. I find myself unable to conclude that the jury could not reasonably have come to the conclusion at which they arrived. It is to be observed that the plaintiff was suggested to the defendant as a blast man by one of the plaintiff's co-workers, one who was in fact a kind of leader of the gang. It is also to be observed that there was a noticeable difference in the colour of the dry fuses as compared with the wet. The latter were white, the former yellow. Without saying that I should have come to the same conclusion myself, I cannot bring myself to decide that the jury were unreasonable if, for example, they took the view that the defendant properly assumed that the plaintiff, being suggested to him as a blastman by the plaintiff's leader, was an experienced man who would know all about fuses, about the possibility of these being sometimes dry and sometimes wet and would be able to understand the difference. There was admittedly no defect in the fuse supplied. The negligence suggested lies solely in failing to point out to the plaintiff the difference between the two kinds. But, in view of the difference in colour and in view of the way the plaintiff was selected for the work, I think a jury might not unreasonably conclude that the defendant was entitled

to assume a sufficient knowledge and experience on the part of the plaintiff to enable him and to cause him to discover any differences in the time to be allowed for ignition which might exist between the fuses supplied at one time and those supplied at another. I say that, while I might not take that view myself, yet I cannot say that six reasonable men could not possibly take such a view. This being a view which they may have taken, I think that there should not even be a new trial. No objection was taken to the trial judge's charge, except upon one point with respect to which the jury found in the plaintiff's favour, viz., that the plaintiff was an employee of the defendant. I think there is, to say the least, as much reason for saying the jury were unreasonable in this finding as in the answer as to the defendant's negligence, although in the actual situation it was not perhaps very material.

I, therefore, think the appeal should be dismissed with costs.

It was practically intimated upon the argument that the cases already decided in this court unfortunately prevent any possibility of the plaintiff having recourse to the Workmen's Compensation Act, owing to the delay in bringing the action.

SIMMONS, J.:—The plaintiff brought an action against the defendants for an accident arising out of alleged negligence of the defendants, their servants or employees.

The plaintiff says he received injuries while in the employ of the defendants and in charge of blasting operations on the work which was then carried on by the defendants in the construction of a railway. The trial judge submitted to the jury one question only for their consideration in regard to negligence, namely, whether there was negligence in regard to a certain fuse which the defendant supplied to the plaintiff.

The defendants supplied the plaintiff for some time with fuse which had been subjected to moisture and, therefore, did not burn as rapidly as a dry fuse. Subsequently they supplied the plaintiff with a dry fuse which burned more rapidly and as a result a shot which the plaintiff was setting off ignited sooner than the plaintiff anticipated and the explosion injured the plaintiff.

Questions were submitted to the jury, the first one being:

"Were the plaintiff's injuries caused by negligence on the part of the defendant Parsons?" and the second question: "If so, in what respect was he negligent?"

The jury answered the first question as follows:—

"No; we find there was no direct negligence on the part of the defendant Parsons."

And they answered "No" to the second question.

Afterwards, the foreman of the jury, in reply to a question by the court said: "The word 'direct' possibly should have been, may have been, left out. We meant to convey they were not responsible—that Parsons was not responsible for negligence."

Counsel for the appellant argues that this verdict is perverse and that only one conclusion could be arrived at upon the evidence by a jury, namely, that the defendant was negligent. "If the evidence is such that only one conclusion can be drawn, the court may enter judgment in cases where no jury could properly find a different verdict," per Lord Loreburn, in Pacquin v. Beauclerk, [1906] A. C. 148.

It is quite apparent from the case that there are circumstances from which a jury would be properly entitled to draw inferences and these circumstances are the relations between the parties in regard to the employment, involving questions of skill—questions as to what extent the defendants relied upon the plaintiff's knowledge and skill as a blast man in charge of a particular kind of work; and to what extent the plaintiff should, under the circumstances rely upon the defendants' care in the supply of material, rather than upon his own judgment as a workman skilled in the use of explosive materials which are in their nature dangerous.

It is admitted that the fuse which it is alleged was the cause of the accident was of a different colour from that used on previous occasions.

The legal relation arising out of a duty which the employer owed to the employee to use reasonable care under the circumstances must be determined upon the facts which involve answers to questions above suggested. And this court cannot, therefore, under the circumstances, say that only one conclusion can be reached.

I, therefore, dismiss the appeal with costs.

BECK, J. (dissenting):—No evidence was given on the part of the defendants and there seems to be no pretence that the plaintiff and his witnesses were not honest in giving their evidence or that there is anything unreasonable in their story. Their evidence, therefore, must be accepted, and it was the duty of the jury to consider, with reference to the questions, in issue, what inference of fact ought to be drawn from it. Doubtless they were not bound to draw any inference which was probable or, I suppose, even highly probable, but only such inferences as can be called either the necessary inferences or the inferences which a jury of reasonably minded men could not avoid drawing.

The facts proved were briefly these:

The defendant Parsons, employed, among others, to do some work on the construction of a railway grade which involved the blasting of a large quantity of rock. Parsons asked the leader of the gang of men, of whom the plaintiff was one, if there was a good blastman among them. The leader designated the plaintiff. Parsons consequently put him at that kind of work. He commenced work on the 17th day of May, 1912, and continued until the time of the accident, which is the subject matter of the action, namely, 20th July, 1912. Parsons was to furnish all the materials and implements necessary for the work of blasting and in fact did so. Continuously from the commencement of the work until immediately before the accident, the fuses supplied by Parsons to the plaintiff were damp and consequently were slow in affecting an explosion; the fuses supplied for use just proceding the accident were dry and consequently effected an explosion more quickly. The plaintiff was not informed of the difference and taking no more care than formerly was consequently injured.

These facts are quite clear upon the evidence and I see no evidence of contributory negligence on the part of the plaintiff, upon which moreover the jury were not directed and made no finding. In my opinion under the circumstances stated it was the duty of Parsons to warn the workmen engaged in blasting of the difference in the new supply of fuses. It does not expressly appear that Parsons was aware that there was a difference in the character or condition of the fuses supplied just prior to the accident from those formerly supplied, but this would not relieve him. He, as an employer, was bound to take all reasonable precautions

for his workmen's safety; and was responsible for personal injuries occasioned by a defective system of using appliances or material; and it is not necessary to shew that he had knowledge that the system or the appliances or material were defective; he was bound at his peril to make proper provision in these respects. Webster v. Foley, 21 S. C. R. 580.

The jury found that "there was no direct negligence on the part of the defendant Parsons." Then the foreman said: "the word 'direct' possibly should have been—may have been left out; we meant to convey they were not responsible." Then the jurors on being asked if they concurred with the statement of the foreman said that they did.

In my opinion the answer of the jury was against the evidence. Under such circumstances it seems clear to me that instead of directing a new trial this Court has power to direct judgment for the plaintiff notwithstanding the finding of the jury. In my opinion this power appears in Rule 326 and the decisions under the corresponding English and Ontario Rules, which are referred to at length in the opinion of my brother Stuart, it is to be noted that the jury have assessed the damages. It would, therefore, allow the appeal with costs and direct judgment to be entered for the plaintiff for the amount of damages found by the jury, namely, $750.

Appeal dismissed; BECK, J., *dissenting.*

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

CASE THRESHING MACHINE CO. v. DESMOND.

Promissory Note—Form—Payee Must be Indicated With Reasonable Certainty—Note Payable to Specified Person —Negotiability—Bills of Exchange Act, R. S. C. 1906, ch. 119, secs. 20, 22, 176.

The following instrument was *held* (Stuart, J. dissenting) to be a promissory note within the meaning of sec. 176 of the Bills of Exchange Act, R. S. C. ch. 119, and that it was negotiable by virtue of sec. 22 of the said Act:

"Threshing Memorandum.

Grain.	No. of bushels threshed.	Price per bushel.	
Wheat	3,922	10	$392 20
Oats	2,727	7	190 89
Barley	554	8	44 32
			$627 41
			120 29
			$507 12

"I hereby acknowledge having received a copy of the above account which I accept as correct, and agree to pay——days from date, and if not paid on that date I agree to pay interest at the rate of 10 per cent. per annum on the same from that date.

"I also acknowledge having received notice of retention of abovementioned grain under the thresher's lien until payment of this account in full.

(Sgd.) JAMES DESMOND."

On the back of the note appeared: "Julius Haas, Oct. 26, 1912."

Appeal from the judgment of His Honour Judge Crawford, in favour of the plaintiff.

The appeal was heard by BECK, SCOTT, SIMMONS, and STUART, JJ.

J. B. Howatt, for plaintiff, respondent.

J. S. Scrimgeour, for defendant, appellant.

BECK, J.:—The sole question for decision in this appeal is whether the instrument, of which the following is a copy, is a promissory note:

"Threshing Memorandum."

Grain.	No. of bushels threshed.	Price per bushel.	
Wheat	3,922	10	$392 20
Oats	2,727	7	190 89
Barley	554	8	44 32
			627 41
			120 29
			$507 12

"I hereby acknowledge having received a copy of the above account which I accept as correct, and agree to pay in ——— days from date, and if not paid on that date I agree to pay interest at the rate of 10 per cent. per annum on the same from that date.

"I also acknowledge having received notice of retention of above mentioned grain under the Thresher's Lien until payment of this account in full.

(Sgd.) James Desmond."

On the back of the instrument appeared "Julius Haas, Oct. 26, 1912," apparently the date on which the instrument was acquired by the bank, as endorsee; and to whom the amount of it was ultimately paid by the maker.

Section 176 of the Bills of Exchange Act (R. S. C. ch. 119) says: A promissory note is an unconditional promise in writing made by one person to another, signed by the maker engaging to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer. Section 17 defining a Bill of Exchange also uses the words "A specified person or to bearer."

Section 20 says: "The drawee must be named or otherwise indicated in a bill with reasonable certainty."

By virtue of sec. 186, the provisions of sec. 20 apply to a promissory note as well as to a bill of exchange.

The result is that in either case if the bill or note is not payable to bearer the payee must either be named or "otherwise dictated with reasonable certainty."

In Green v. Davies (1825), 4. B. & C. 235, a paper in this form,—"December, 1814. Received of W. D. Boaz £100, which I promise to pay on demand with lawful interest," was held to be a note; Bayley, J., saying: "As to the first point—(that it was not a note because no payee was named)—of that there can be no doubt; no particular form of words is necessary to constitute a note; and Chadwick v. Allen (2 Stra. 706) is in point to shew that it is not necessary to name the payee more explicitly than this note does; the substance of the note there was, '£15.5 balance due to Sir Andrew Chadwick, I am still indebted and do promise to pay.' Whom he was to pay was not in terms stated but as no other payee was named, who but Sir A. Chadwick could be the object of his promise? So here, as the money was received from Boaz, he alone could be the person to whom the money was to be paid back."

A promise to pay "to the trustees acting under the will of the late W.," was held to be a promissory note. Megginson v. Harper (1834), 2 C. & M. 322.

A paper in this form: "I.O.U. £85 to be paid May 5," not addressed to anyone was held to be a promissory note. Waithman v. Elsie (1843), 1 C. & K. 33.

Daniel on Negotiable Instruments. 5th Ed., sec. 102, after citing the above decisions says: "But as there is no certainty about the payee on the face of the paper, and nothing from which he can be ascertained" (i.e. on the face of the paper) "such a paper could not consistently with accepted principles be held negotiable," and adds: "Pothier puts a case quite similar. 'If,' he says, 'the drawer should omit the name of the payee, but should draw the bill in that form: 'Pay a thousand livres at sight, value received of A.B.' it appears to me reasonable to presume that the drawer intended that the bill should be payable to the person from whom the value had been received as no other person is named to whom it ought to be paid.' He adds however that he has learned from an experienced merchant that bankers would make a difficulty as to paying such a bill."

It was formerly held in England (contra in Scotland) that a bill or note payable to a specified person without more was not negotiable. The Bills of Exchange Act (R. S. C. 1906, c. 119) changed the law in this respect by sec. 22, which enacts:

"A bill is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it should not be transferable."

In view of the foregoing I am of opinion that the paper in question is a promissory note, for the reason—to answer the only important objection—that the payee is indicated with reasonable certainty as being the person who threshed the maker's grain, this being unquestionably plain from the words of the paper especially the portion which "retains" a lien under the Threshers Lien Act—the thresher being the only person who could "retain" a lien under that Act.

I think also that the note was negotiable in view of the statutory provision which I have quoted. In the result I am of opinion that the appeal should be allowed with costs and the judgment in favour of the plaintiff be set aside and judgment be entered dismissing the plaintiff's action with costs.

STUART, J.:—Upon consideration I find myself unable to conclude that the document in question here is a promissory note. But I think the appellant should succeed on another ground.

Haas bought a threshing machine from the plaintiffs and as security for the payment of the price he assigned to the plaintiffs "all moneys which shall be owing to or earned by the purchaser for work done by him or his agents . . . with or by the aid of the said machinery."

This was in April, 1912. No debt was then in existence which could be covered by the assignment. Therefore, although this was in writing, it could be nothing more than an equitable assignment binding on the conscience of Haas.

Early in October Haas did some threshing with the machinery for the defendant and the defendant signed the document in question.

On the 23rd October, 1912, the plaintiffs served a notice on the defendant in which, after stating that all moneys earned by Julius Haas while threshing for the defendant had been assigned to them by writing and warning him not to pay the money to him (Haas) "or any one except ourselves or our authorized agent," they proceed to say, "You are hereby instructed to pay the amount of your threshing account into

Merchants Bank at Sedgwick to our credit at the earliest possible date."

On October 26th, 1912, Haas wrote his name on the back of the document he had received and apparently left it with the Merchants Bank at Sedgwick.

Then on November 2nd, 1912, the defendant went and paid the money to the Merchants Bank at Sedgwick. There is not a word in the case stating to whose credit he made this payment. Neither in the statement of defence nor in the statement of admitted facts is there any assertion that the defendant paid the money to the bank to his own credit or to Haas's credit or merely to the bank as the party itself beneficially entitled to the money. It is merely said that he paid it "to the bank."

Now for my part I am prepared to hold that the effect of the notice of 23rd October was to inform the defendant that the Merchants Bank at Sedgwick was the plaintiffs' authorized agent to receive the money, and he went there and paid it as he was told to do. True, it does not affirmatively appear that he paid it in with a direction to put it to the credit of the plaintiffs. But neither is it stated that he did not do so. There is absolutely no suggestion in the case that the defendant was induced to go to the bank otherwise than in conformity with the plaintiffs' notice. There is no evidence or statement that the bank sent him any notice. The only inference is that he went there on account of the notice of the plaintiffs. In my opinion he was entitled to assume that the bank had been authorized by the plaintiffs to receive the money on their behalf. There is no statement that the defendant knew anything about Haas having endorsed the document to the bank.

And yet in the face of all these circumstances, not mentioned in the argument before us at all, we were asked to let the defendant's liability to pay the $507 twice turn simply upon the question whether the document was a promissory note or not and from the judgment of the learned district court judge it appears that counsel agreed before him that everything depended upon whether the document was a promissory note or not.

For my part I do not think this court ought, or any court ought, to decide that a farmer must pay twice for his threshing upon a mere erroneous statement by counsel of

what they conceived to be the sole point of law in the case. The case went to trial on certain facts admitted and pleaded. There was no evidence given. For my part I think the proper inference from the facts submitted is that the Merchants Bank were authorized by the plaintiffs to receive the money for them. At least the defendant was entitled to assume that. Obviously he did what he was told to do. What unrevealed facts may be behind the case which would raise a dispute between the plaintiffs, Haas and the bank, I do not know. But I for my part do not propose on the facts stated and admitted to make the defendant bear the burden of their misdoing or mistakes or omissions and pay twice for his threshing even though I do feel compelled to hold that the instrument was not a promissory note.

To be a promissory note the document must itself indicate the payee with reasonable certainty. There is no name in the document and there are no words of any kind which can be taken as intended to describe or identify the payee. I do not think that such a document as this "I promise to pay on demand $60 for a horse I bought on April 10th, 1914," signed by a man and handed to the person from whom he had in fact bought a horse on April 10th, 1914, should be treated as indicating with reasonable certainty the payee merely because it can be shewn by extraneous evidence that he did buy a horse on April 10th, 1914, from the man to whom he gave it and that that man's name was John Smith. But the present document is not even as definite as that because it bears no date, and states no date or year when the threshing was done. It is not impossible that Desmond may have had exactly the same number of bushels of grain threshed in 1911. The fact that the document was handed to Haas does not appear on its face. The words "indicated therein with reasonable certainty" mean more in my opinion than merely "if the person intended to be paid can be ascertained with reasonable certainty.

I think the Statute means that there must be words in the document indicating not merely for what value the promise to pay is given but by their own meaning pointing to some particular person, not necessarily by naming him but by a description, a positive reference, which may be applied to some certain person as the person to be paid. I can find no such words in the present document.

But for the reasons I give I think the appeal should be allowed but without costs, the judgment below set aside and the action dismissed but without costs.

SCOTT and SIMMONS, JJ., concurred with BECK, J.

Appeal allowed.

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

BERGE v. MACKENZIE, MANN & CO., LTD.

Master and Servant—Negligence—Delegation—Scope of Employment—Blasting Operations—Injury Caused by Careless and Untrue Statement of Fellow-servant—Deceit—Contributory Negligence.

Plaintiff was employed as powder man in charge of blasting operations on work carried on by defendants. S. was one of a gang of men who worked in conjunction with plaintiff and whose duty was to drill holes for blasting. While plaintiff, in the course of his employment, was fixing four shots for explosion S., whose sole duty was to drill holes, volunteered to light the fuse of one of the shots, and plaintiff agreed to allow him to do so. After plaintiff had lit three of the fuses he called upon S. to retire with him. Plaintiff and S. then ran away fifty or sixty feet to await the explosions. Three only of the shots went off, being the ones which plaintiff himself had lit. The fourth did not go off with the others, and S., in reply to a question put to him by plaintiff, replied that he had not lit the fuse. Plaintiff then approached the fourth fuse without waiting longer and, just as he reached it, it exploded and injured him. S. had been in the habit of assisting plaintiff in lighting the fuses, which was not interfered with or forbidden by two foremen superior to plaintiff who knew of it.

Held, that the master was not liable since S. was not acting within the scope of his employment at the time the plaintiff was injured.

Per STUART, J.:—Where a servant employed for a particular purpose, without necessity, delegates his duty to a fellow-servant the master is not liable to the delegating servant for injuries which the latter receives through the negligence of the said fellow-servant.

Guilliam v. *Twist*, [1895] 2 Q. B., applied.

Per STUART, J.:—Owing to the relationship between plaintiff and S. there was a duty cast upon S. to be careful in his statements.

Per STUART, J.:—Since negligence was made the basis of the action the plaintiff could have no other rights than such as would arise from a careless and negligent misstatement of fact, and not such as would arise from a deceitful statement.

Per SIMMONS, J.:—The plaintiff was guilty of contributory negligence on the ground that he, having heard the three shots go off and being an experienced shot man, knew the danger of approaching an unexploded shot in so short a time.

An appeal by defendants from the judgment of BECK, J., without a jury, awarding plaintiff $3,500 in an action for damages for injuries received through the alleged negligence of one Stephanson, a fellow-employee of plaintiff.

The appeal was heard by STUART, SCOTT, and SIMMONS, JJ.

O. M. Biggar, K.C., for defendants, appellants.

B. Pratt, for plaintiff, respondent.

STUART, J.:—The learned trial judge's judgment is short and may as well be repeated. It is as follows:—

"With a good deal of doubt I find in favour of the plaintiff. It appears to me that Stephanson, though originally employed to do other work, gradually drifted into the position of an assistant to the plaintiff with the knowledge and the consent and approval of two or three foremen superior to the plaintiff.

"If this is so, I think the defendants liable for the negligence of Stephanson who I find was negligent and whose negligence I find was the cause of the injury to the plaintiff.

"I assess the damages at $3,500 and give the plaintiff costs."

The facts shortly are these. The defendants were railroad contractors and were engaged in constructing a bridge with cement piers. They required a quantity of gravel and were going to obtain it from a certain gravel bed which needed to be opened up. As it was winter time the frozen surface had to be blasted out with explosives. There was a gang of some 125 or 130 men over whom there was a superintendent, O'Connor, and under him a foreman, Murray, who was assisted by a "straw-boss" Hagan. Among the men there was a limited number of drillers whose sole duty was to drill holes in the hard face of the gravel into which the explosive material was to be inserted. But having drilled these holes they had nothing further to do with the blasting. They were supposed to retire and then the blastman, in this case the plaintiff, came, inserted the explosive and set them off. The plaintiff was supplied with an electric battery with which to set off the exposives but on the particular occasion in question, according to his story, which was uncontradicted, and evidently believed by the trial judge, Hagan the "straw boss," told him to go down with his men and open up the

gravel pit and that it was not necessary to take the electric battery along. The plaintiff proceeded to the work. The drillers had opened or drilled four holes into which shots were to be inserted by the plaintiff. Among the drillers was Stephanson. When the drilling was completed they all retired except Stephanson. The latter remained with the plaintiff, and apparently watched the plaintiff insert the explosive and attach the fuse in each of the four holes. Then when the plaintiff proceeded to light the fuses Stephanson said to the plaintiff, "I will light the last one for you," and the plaintiff said, "All right," and permitted him to do so. The plaintiff therefore lit only three of the fuses and then called upon Stephanson to come along. The plaintiff said in his evidence (a thing which is very important), "Stephanson, he was lying there lighting his; I waited there for a while and asked him to come along." The two then ran away fifty or sixty feet to await the explosions. Three only of the holes went off, being the ones that the plaintiff had himself lit. The fourth did not go off with the others and the plaintiff asked Stephanson if he had lit the fuse to which Stephanson replied that he had not. The plaintiff then approached the fourth hole without waiting longer and just as he reached it it exploded and injured him very seriously in the face and head.

It appeared that Stephanson had been in the habit of assisting the plaintiff in lighting his fuses and that both Murray and Hagan had seen this and had not interfered or forbidden it. That is clearly as far as the plaintiff's evidence goes. It was upon this circumstance, no doubt, that the learned trial judge based his opinion that Stephanson "though originally employed to do other work gradually drifted into the position of an assistant to the plaintiff with the knowledge and consent and approval of two or three foremen superior to the plaintiff."

Upon the argument of the appeal the chief contest seemed to turn upon the question whether Stephanson was acting within the scope of his employment when he went to the plaintiff's assistance and lit the fourth fuse. I am not sure that this is all that is involved in the case. There was admittedly no negligence on Stephanson's part in his dealings with the fuse. At least none is suggested. The explosion in the fourth hole was not an accident. It was

really not the accident which caused the injury. That explosion was intended to occur. The "accident" lies almost, though not quite, entirely in a separate field, in the field of conversation rather than of action. The only action which could be said to have been a negligent one and to have contributed to the injury was the too early approach of the plaintiff within the zone of danger. Aside from that approach everything else which can be said to have caused the injury, insofar as legal liability is concerned, is a matter of conversation. The real negligence charged against Stephanson is not in connection with the lighting of the fuse but consists in his false, and therefore, so it is said, in the circumstances, negligent statement to the plaintiff that he had not lit the fuse at all. There was no doubt a duty upon Stephanson to be careful to tell the plaintiff the exact truth in regard to the matter, and if in the circumstances the plaintiff was entitled to rely upon his statement and was not himself guilty of carelessness in not making more careful inquiry then no doubt Stephanson at least, whatever may be said of his employers, the defendants. was liable.

The case is interesting because it seems to present an example of the occasional overlapping of the doctrine of deceit or fraud and the doctrine of negligence. For instance the case of Le Lievre v. Gould, 68 L. T. p. 626, decides, according to the head note, that "no action will lie for damages suffered by a plaintiff in consequence of his reliance on untrue statements made negligently but not fraudulently by the defendant when there is no contract between them." The court overruled Cann v. Wilson, 39 Ch. D. 39, a decision of Chitty, J., and approved of Scholes v. Brook, 64 L. T. 674, Lord Esher, M.R., in giving judgment, speaks of negligence as arising out of some act when two persons are so related to each other physically as to raise a duty to take care. But in regard to statements he says: "If a man wilfully tells a wicked falsehood to another intending him to act upon it, that is a fraudulent act. Negligence, however great, is not fraud. The official referee has heard the whole of this case and has come to the opinion that the defendant has not been guilty of any dishonest conduct, that he has not told a wicked falsehood but that all he did was to give negligently an untrue certificate. That negligence gives the plaintiff no cause of action either at law or in equity."

And Bowen, L.J., said: "It was argued that though the defendant may not have been dishonest yet he was so grossly negligent that damage was thereby caused to the plaintiffs. What duty did he owe to the plaintiffs? None under any contract with him." The learned judge relies specifically on the absence of any contract as a reason for denying liability.

There is no doubt that if Stephanson knew perfectly well that he had lit the fuse and yet falsely and therefore necessarily with a wicked and malignant mind told the plaintiff he had not, intending the plaintiff to act upon it he would be liable in an action of deceit. But with regard to negligence Derry v. Peek, 14 A. C. 337, as explained in Nocton v. Lord Ashburton, 83 L. J. Ch. 788, certainly decides that there is no right of action for a false statement made not knowingly and with a wicked mind but merely negligently unless there exists some special relationship between the parties which creates a duty to be careful. From both Nocton v. Lord Ashburton and Le Lievre v. Gould it might at first sight appear that this special relationship could only arise out of contract. But there is really nothing in those cases which actually lays down any such limitation; and there can surely be no doubt that if two fellow workmen are working together at a job in which one has to rely upon the statement of his fellow workman as to a certain fact, the existence of which is necessary before he can safely proceed to do a certain thing in the course of his employment and if that statement is made by the other and the first, in reliance upon it, does that thing, and, owing to the statement being untrue and the necessary fact not existing, he does a thing which is therefore dangerous and so is injured, the other workman is liable, not merely for deceit if he knowingly and therefore wickedly misstated the fact, but also for negligence if he carelessly misstated it, because in such a case it would be his duty to be careful not to make a misstatement, and of course his master would also be liable if he acted within the scope of his employment as that phrase is generally understood.

The present action is based upon negligence. It was not necessary for the plaintiff to go so far as to assert that Stephanson knowingly and wickedly misstated the fact, which would amount to fraud and deceit. But the greater fault, of course, includes the less and although, as Esher, M.R., says,

negligence, however great, is not fraud still fraud may, in this case, if it existed, be treated as negligence. The plaintiff's contention is that Stephanson either knew or ought to have known that he had lit the fuse. He was not called as a witness but seems to have been sent to an asylum for a time and after that he could not be traced.

There is, as it seems to me, at least a bare possibility in view of the evidence of suggesting the theory that he only honestly thought he had failed to light the fuse after attempting to do so and was merely negligent in failing to explain that he had made the attempt without apparently succeeding. The plaintiff's evidence, which is all we have, is that he went back "because he told me he did not have fire to it." Taking this as it stands it perhaps can only mean that fire was not applied at all. But one cannot help regretting that, when liability for negligence is attempted to be founded upon so narrow a basis as a careless verbal statement, the exact words were not directly related because in indirect narration a witness almost inevitably lends a little colour to the statement by his own words. On cross-examination it is again put in indirect narration by the words of counsel. The question and answer were:—

"Q. And you asked Stephanson if he had lighted the hole he had volunteered to light and he told you he had not. A. Yes."

But there is one expression in the evidence of the plaintiff that does suggest the possibility of an honest though careless mistake. The plaintiff said: "Then I asked Stephanson if he had his shot lighted so when the three went off we went back to light his hole." Now if Stephanson also went back as this seems to imply he must have himself thought there was no danger. But how far he went back does not appear; and as he was not hurt he could not have approached as closely as the plaintiff. Of course if he had a wicked intent this may have been part of his scheme to put the plaintiff off his guard.

Be this as it may, in my opinion, the conclusion cannot be avoided, taking the above evidence at its face value and, although in indirect narration, as representing accurately the words used by Stephanson, that Stephanson was at least careless if not positively deceitful in making such a statement in the circumstances. For the reasons I have given I think owing to the relationship between the two men there

was a duty to be careful in his statements cast upon Stephanson and that if there was nothing more in the case Stephanson and his employer would be liable.

The question whether it was really deceit or only negligence seems to me to be of importance because to a claim resting upon deceit an answer that Berge was himself careless in relying upon the untrue statement might not be an answer at all and perhaps the liability of the employer in such a case might not be so extensive, while if the statement was merely negligently made there is a possibility of charging contributory negligence against the plaintiff.

In my opinion, therefore, although the evidence may seem to favour the view that the misstatement was knowingly and therefore wickedly made, yet, since it is negligence which is made the basis of the action the court should not give the plaintiff any higher rights than such as would arise from a careless and negligent misstatement of fact; because if the defendants were sought to be made liable for a knowingly false and therefore a wickedly deceitful statement of their employee, i.e. for deceit, the action against them should have been definitely placed upon that ground.

This leaves it open clearly to the defendants to charge contributory negligence. In view of what actually occurred I am not sure that the plaintiff ought not to be charged with contributory negligence in going back without further and more careful enquiry and in not pressing Stephanson for a more definite statement, in not asking him, that is, exactly what he had been doing, then, when the plaintiff saw him at the hole. The plaintiff says this, "Then I started to light my three holes and when I came up to the pit Stephanson was lying there lighting his." If he saw Stephanson there "lighting his" why did he not question him more closely, why did he not take care to know the true fact before going back? In such circumstances I doubt very much if the plaintiff is entitled to the benefit of such a rule as is applied in cases of misrepresentation leading to a contract where a person is entitled to rely upon the statement of another party and that other party is not allowed to say that he should not have relied upon it. I am not sure that Stephanson might not, if charged merely with making a negligent statement or an untrue statement negligently, answer back to Berge: "True I may have been negligent in saying that, but you had every opportunity to avoid an accident by being

more careful yourself, you were, yourself, particularly when you were entirely in charge, bound to take reasonable care and when you saw me, as you say, lighting my hole you were yourself careless in acting so quickly and rashly upon that careless statement of mine. A reasonably prudent man would not in such circumstances have accepted my careless statement without more."

I am not sure, I say, that such an answer might not in the circumstances of this case, be successfully made by Stephanson and therefore by the defendants. Of course if he was knowingly deceitful no such answer could be possible, but for the reasons I have given, I think that aspect of the matter should be disregarded.

Even, however, if this be not a satisfactory answer to the claim I think the plaintiff is clearly not in so good a position as a third party or a stranger. I would be quite ready to agree thoroughly with the view taken by the learned trial judge as to the position of Stephanson if the party injured had been a stranger. According to Milner v. Great Northern Ry. Company, 50 L. T. 367, it is sufficient if the servant whose negligence caused the accident has habitually and without objection done the work which was strictly outside of the scope of what he was employed to do. And if a third party had been suing the defendants for an injury caused by some negligence of Stephanson while firing the fuse in question it would, I think, have been clearly no answer if the defendants were to say in such a case that the firing of the fuses was Berge's work and not Stephanson's. In the jurisdictions where we get most of our authorities the doctrine of common employment still exists and therefore prevents our securing many precedents to cover such a case as this. But it does seem to me that there may be cases where the abolition of that doctrine does not necessarily place the plaintiff servant in absolutely as good a position as a stranger. Take the case of Englehart v. Farrant and Company, [1897] 1 Q. B. 240. There the driver of the defendants' delivery wagon had a boy with him to deliver parcels. The driver left the wagon in charge of the boy who, contrary to instructions, drove on and by negligence injured the plaintiff. The defendants were held liable because the driver should not have left the wagon in charge of the boy and his negligence in doing so was the efficient cause of the accident. It was just because of the driver's omission of duty

that the defendants were held liable. But suppose that such a driver had been in the habit of letting the boy drive as they went along though it was not the boy's proper work, but the driver's, and by the boy's negligence the driver himself were injured, if the doctrine of common employment were out of the way would the driver be able to recover from his employees for the consequence of the boy's negligence merely because the employees may have seen the boy doing the driving frequently and had not interfered? I have grave doubt about it. In the present case it was admittedly Berge's own work to light the fuses. He had been supplied with an electric battery for that purpose. It was Stephanson's work to drill holes. After the drilling was done he, just like the boy who wanted to drive, wanted to light a match and set off the fuse. Berge was in charge of him and the whole work. He could have told him to mind his own business and could have himself minded his own. As the driver could keep on driving and holding the reins, as he was paid to do, so Berge could have, and properly should have, kept on lighting all the fuses which it was his duty to do. Instead of that he permits a man under his charge, over whom he had control, to do work with which he had properly no concern. Then by the negligence of that person he is himself injured and he claims that their common employer should be responsible because his superior foreman saw what was going on and did not keep them to their proper work, a thing which he could and should have done himself. In actual fact he is seeking to make them liable for failing to reprove him, the plaintiff, for a breach of duty.

In my opinion the master should not be liable in such a case. In Guilliam v. Twist, [1895] 2 Q. B., it was said: "A servant employed for a particular purpose can have no authority to delegate the performance of his duty to another person unless there is a necessity for his so doing." And this was said as a ground for denying liability of the master to a third person. How much more should it be a ground for denying liability to the delegating servant himself.

This would, I think, be an answer even if the claim were for damages by reason of Stephanson's negligence in lighting the fuse itself. For the same reason and perhaps with still greater force it applies, in my opinion, as against the negligence alleged, viz., the careless and untrue answer about what he had done.

I think, therefore, the appeal must be allowed with costs the judgment below set aside and the action dismissed with costs.

SIMMONS, J.:—The plaintiff was employed by the defendants as powder man in charge of blasting operations on work carried on by the defendants. Another employee of the defendants named Scott was plaintiff's assistant. The plaintiff and his assistant worked in conjunction with a gang of labourers whose work was to drill for the blasting and to open up gravel pits.

The plaintiff says he was told by the foreman Murray to go down and open up the gravel pit, and subsequently told by another boss, Hagan, who was under Murray's direction, that he need not take the electric battery.

About twenty men went down with him to the gravel pit, six of whom were drillers and the rest muckers. Four shot holes were made in the bank by the drillers. The plaintiff was putting in the shots. When the shots were being placed the plaintiff says that Stephanson, a driller, said to him: "Berge, I will put in the last charge for you."

Plaintiff says he concluded that Stephanson was an experienced man by the way he handled everything and that he used to help every day at the blasting with the knowledge of the bosses Murray and Hagan. Plaintiff then relates what happened:

"Q. What happened then when you lighted the fuse? A. Then I started to light my three holes and when I came up to the pit, Stephanson he was there laying lighting his; I waited there for a while and asked him to come along; I was scared mine would explode, so we both run down the river, where the rest of the crowd was standing, then I asked Stephanson if he had his shot lighted, so when the three holes exploded we went back to light his hole.

"Q. Went back to the fuses? A. Yes.

"Q. How many fuses did you hear explode? A. Three, and I was just about to put a lighted match to Peter Stephanson's fuse, when it exploded.

"Q. Why did you go back there? A. Because he told me he did not have fire to it.

"Q. Would you have done that if he had not told you that? A. I would have stayed down there."

The learned trial judge held that the defendants had ratified through their foremen the employment of Stephanson by the plaintiff to assist the plaintiff in the blasting operations and that the defendants were liable for Stephanson's negligence. I am not able to concur in the last statement of the trial judge as to the liability of the defendants for Stephanson's negligence.

In answer to a question by the court the plaintiff said the drillers and blsaters were in his (the plaintiff's) charge. Neither Murray nor Hagan were there. The plaintiff says Stephanson had just finished drilling a hole when he volunteered to put off the fourth charge, and he allowed Stephanson to light the fourth fuse because he was an experienced man and the plaintiff trusted him, and it was quicker to allow Stephanson to light the fourth fuse.

The plaintiff admits that he was under no obligations to accept the assistance in the work which Stephanson volunteered to do for him. He relied upon his own judgment in determining that he would accept the voluntary service and assistance of Stephanson. The accident arose out of the incorrect statement of Stephanson in regard to lighting the fourth fuse. This may have been an honest mistake or a wilful untrue statement, but in either case the plaintiff cannot hold the defendants liable because the plaintiff voluntarily accepted as true and relied upon a statement of the defendants' servant Stephanson.

In the first place the plaintiff was in control of the blasting operations at the time of the accident. He accepted the voluntary help of Stephanson relying upon his own judgment. Having done so he went a step farther and relied upon a statement of Stephanson's and as a result he was injured. The firing of the fourth shot after he returned shewed that Stephanson had actually lit it, but the fuse had delayed in some way in burning down to the explosive. I think he must be held to have known that Stephanson at least tried to fire the shot and he allowed Stephanson's statement to be substituted for his own judgment in determining when it was safe to return, and he must therefore fail. This is aside from the question of contributory negligence, and he is in my opinion also properly held responsible himself for the accident under this head in view of the fact that he heard the three shots go off and must be held as an experienced shot man to have known the danger of approaching an unexploded shot in so short a time.

I would therefore allow the appeal with costs.

The plaintiff's claim under the Workmen's Compensation Act is admitted and will therefore go back to the trial judge for assessment.

SCOTT, J., concurred in the result.

Appeal allowed.

ALBERTA.

STUART, J. DECEMBER 30TH, 1914.

SUPREME COURT.

MACDONALD v. McLEAN.

Vendor and Purchaser—Contract for Sale of Land—Mortgage Purporting to Create Easement—Constructive Notice—Waiver of Rights.

The defendant agreed to purchase from plaintiff a lot for $3,500. $1,300 of which was to be paid by defendant assuming "loan of $1,300." The loan of $1,300 was secured by a mortgage, by which plaintiff purported to create a right-of-way over the most easterly ten feet of the said lot for the benefit of adjoining properties, some of which were owned by plaintiff and in mortgage to the same mortgagee. No easement had been created in the manner prescribed by the Land Titles Act. Defendant had never seen the mortgage nor was she told of the alleged easement until after she had made several payments under the contract. When informed thereof defendant refused to accept a title subject to it. Plaintiff sued for the balance owing under the agreement.

Held, that notice of the existence of a mortgage should be imputed to the defendant but not constructive notice of the unusual contents of the mortgage in question, and that defendant was entitled to a transfer, free from any easement.

Held, also, that defendant had not waived her rights by making payments under the agreement subsequent to notice of the alleged easement.

Action by plaintiff to recover the balance owing under an agreement of sale, which defendant refused to pay until satisfied that plaintiff could give a title free from an alleged easement referred to in a mortgage of the property.

A. H. Clarke, K.C., and H. P. Saunders, for plaintiff.

Joseph Shaw, for defendant.

STUART, J.:—On April 10th, 1912, the plaintiff was the registered owner of lots 21, 22, and 23 in Block 52, plan 47 OP Calgary. Lot 21 is the most westerly and along its western boundary lies 5th St. N.E. in the City of Calgary. Along the northern boundary of the lots lies 10th Avenue N.E. Lot 24 lies to the east of Lot 23 and there is a lane on the southern boundary of the lots.

The lots are 25 feet in width and 120 feet in length. The plaintiff had, however, surveyed 50 feet off the southern end of all the lots and had divided this 50 feet into two lots of 25 feet each, so that there were three lots facing on 10th Avenue N.E. each 25 feet wide and 70 feet deep and also two lots with 25 feet each on 5th Street N.E. and 75 feet deep.

The plaintiff erected, so I understand, five houses, one on each of these five lots and on the 2nd of April, 1912, he gave a mortgage on each lot to the Trust and Guarantee Company, Limited, to secure repayment of certain loans.

The mortgage on the northerly half of the southerly 50 feet, which is the land in question in this action, began with the usual recital provided for in the statutory form of mortgage prescribed by the Land Titles Act, viz.: "I, James W. MacDonald, being registered owner, &c., &c." Then follows a description of the property, and after this description the recital proceeds: "together with a perpetual easement of right of way of ingress and egress for animals, persons and vehicles for all purposes as appurtenant to and for the benefit of the south fifty feet of the said lots (21, 22 and 23) in common with the owners or occupiers from time to time of said lots 21, 22, 23 and 24 over and along that portion of the said lots described as follows." Then follows a description of a strip 10 feet wide running east and west taken off the south end of the three 70 foot lots as rearranged and off the east side of lot 23 southward from the eastern end of the east and west strip. The mortgage was for $1,300, and was repayable in five years from its date. A similar recital was contained in all the other mortgages except that upon the southerly half of the southerly 50 feet, which rearranged lot of course had the land to the south of it.

The mortgage then proceeds in the usual form and contains the usual clause mortgaging to the company the plaintiff's estate and interest in the "land above described."

On April 4th, 1912, the plaintiff entered into an agreement with the defendant by which the defendant agreed to buy the north half of the southerly fifty feet for the sum of $3,500, payable $400 in cash, $40 per month and $1,300, by assuming "loan of $1,300, payable to the Trust & Guarantee Company payable in five years."

The present action is brought to recover a balance of $609.33, alleged by the plaintiff to be due under the terms of the agreement. The defendant raises merely a question of title and is quite willing to carry out the agreement and pay the money provided the plaintiff can give her the title to which she claims to be entitled, viz., a title in fee simple, free of encumbrance except the mortgage to the Trust & Guarantee Company, Limited, without an easement over the ten feet at the rear of the lot in question in favour of anyone else.

The writ was issued by the plaintiff suddenly while the defendant's solicitors were examining the question of the title and when they had considerable money in their hands belonging to the defendant, some of which it was understood was to be paid to the plaintiff. The plaintiff apparently became afraid that the defendant was going to attempt to withdraw from the agreement on the ground of want of title and began his action at once so as to be able to serve a garnishee summons on the defendant's solicitors and to stop her money, which he did.

The defendant makes no attempt to repudiate the agreement entirely but insists that she is entitled to an assurance that the plaintiff would be able to convey a good title in fee simple free of all encumbrances except the reservations contained in the original grant from the Crown.

It was admitted that the defendant had not seen the mortgage to the Trust & Guarantee Company, and she said that she had not been told of the alleged easement and this was not denied by the plaintiff. As I intimated at the trial I think notice can be imputed to the defendant of the existence of a mortgage and of the usual terms in a mortgage to secure a loan. But in the circumstances of this case I do not think the court ought to impute any further knowledge to her. Indeed the agreement of sale does not refer to a mortgage at all but speaks only of "a loan," and I do not recall that any evidence was given to the effect that she was told at the time of signing the agreement that there was a

mortgage. It is stated in Williams on Vendors and Purchasers, 2nd Ed., p. 245, that notice of a document is notice of its contents, but that rule is subject to some qualification. It is a rule of equity and in this particular case I do not think notice ought to be imputed to the defendant of the extremely unusual contents of the mortgage in question. I characterize them as extremely unusual but perhaps a more proper term would be absurd. Let us examine the alleged easement a little. Section 48 of the Land Titles Act prescribes the manner in which an easement may be created. It is to be created by means of a transfer in the usual form except that instead of a transfer the whole estate of the transferor a lesser estate is to be stated as being transferred.

Instead of adopting the prescribed form the owner has apparently attempted to create an easement simply by referring to himself in the initial recital clause of the mortgage first as the owner of an estate in fee simple in the land and then as the owner of an easement over it and other land in favour of some one else. I always thought that the person in whose favour an easement existed was the owner of it, not the person who granted it. A person owning the fee cannot be said to be the owner of an easement over his own land. He has the right of course but the larger estate includes the lesser which is merged or rather embodied in it. A separate estate in the nature of an easement must first be carved out of the larger, created in the way laid down in the Act, before it can be mortgaged. The recital in the mortgage is untrue. There existed no separate estate in the way of an easement because MacDonald owned the fee simple, which included everything. I do not think, however, whatever may be the effect, if it has any at all, of this clause in the recital, that the defendant should be charged with constructive notice of it. The clause is not properly in the mortgage. It is not the way prescribed by the Act for creating an easement. There was not the slightest reason therefore why the defendant should even suspect the existence of such a clause.

The doctrine of constructive notice is one which is not to be extended: In re Valletort Sanitary Steam Laundry Company, Limited, [1903] 2 Ch. 654. In this case it was held by Swinfen Eady, J., that where the manager of a limited company in forgetfulness of the fact that debentures

issued by it forbade the creation of any prior charge deposited the company's title deeds with a bank to secure present and future advances and the bank was aware that the debentures had been issued and in fact had some of the debentures in its possession deposited by another customer, the bank could not be charged with constructive notice of the provision in the debentures forbidding the creation of any prior charge.

Neither do I think the defendant ever waived her rights. It is true she made some payments after being told of the existence of the alleged easement but when she was so told she expressly informed the plaintiff that she did not propose to accept the title with an easement over her land. In effect she stated that she proposed to claim her rights as given by the agreement which was that she should upon payment get a title fee of all encumbrances.

There is, however, still more in the case. Even if we assume for the moment that some sort of an easement or right was really created by the mortgages it must be remembered that there was certainly no notice of the other three mortgages. The idea of the person who drew the mortgages was undoubtedly to add some benefit to the mortgagees in respect of each parcel mortgaged. Now in respect of the property in question here the intention was to attach to it and to the owners of it, that is the mortgagees and persons buying from them under a judicial sale. a right over the adjoining lots. There was no need to create any additional right in the mortgagees or their purchasers over the very land in question. What was wanted was an easement over the adjoining land for the benefit of this piece of land. The mortgagees, by going into possession or their purchasers at a sale would get every right needed both of possession and enjoyment so far as this land was concerned without the clause in question at all. It was by the other mortgages that a right over ten feet of this land was intended to be created for the benefit of the owners of the other lots. And yet those mortgages were never registered with respect to this lot and they are not referred to in the agreement of sale. I doubt very much whether it should be considered that any easements, even if they were created in equity as between MacDonald and the company, were ever registered at all. They are not in a registrable form.

I think, therefore, that the plaintiff is not entitled to judgment until he makes it clear that he is able to deliver title to the whole lot free of any easement. In the absence of the mortgage company I hesitate to decide that there never was an easement created at all. But the clause in the mortgages certainly should be treated at least as a cloud upon the title. Of course so far as the mortgage on the land in question is concerned it may be that by payment of the mortgage moneys and by the following discharge the easement clause would cease. There would, however, be still possibly existent the clauses in the other mortgages which as I have pointed out are perhaps really the true source of difficulty.

The proper judgment is, I think, that the plaintiff be given one month to furnish proof to the satisfaction of the Master that he will be able to give title free of all claims of easement on the ten-foot strip from any source when the final payment is made. Upon such proof being given he is to be at liberty to enter judgment for his claim. In default of such proof being given within that time the defendant should have the option of moving to rescind the contract and for a judgment for the return of the moneys paid or of affirming the contract either without the ten feet or with it with the easement still against it and asking the Master to fix the compensation which should be allowed her. The action will in that event be referred to the Master for that purpose.

With regard to costs this case furnishes a good example of the usefulness of a Vendor and Purchasers Act, which we do not enjoy in this Province. Nothing was involved but a pure question of title and yet it has taken a regular action to determine it.

My present view is that the plaintiff ought to pay the costs. He unfortunately took his stand upon the law which, in this case, has failed him, if my view is correct of what the law is. If it had not been for the temptation of the garnishee summons I doubt if the action would ever have been brought.

The judgment ought also I think to include a direction that the garnishee summons be set aside with costs.

Upon the question of costs, however. I shall not be averse to hearing further argument if plaintiff so desires.

ALBERTA.

STUART, J. DECEMBER 31ST, 1914.

SUPREME COURT.

DOW v. BODY AND GRAHAM.

Contract — Mutual Agreements — Breach of — Specific Performance.

It was a term in an agreement for the sale of G.'s business, etc. to B. and D. that B. should pay $10,000 in cash and that D. should pay $10,000 in the manner therein set forth. B. did not pay his $10,000. The document was left with a solicitor acting for both parties.

***Held*, that specific performance could not be obtained by G. against D., inasmuch as the payments by D. and B. were mutually conditional.**

***Held*, also, that the agreement was never concluded.**

Action by plaintiff to set aside, on the ground of fraud and misrepresentation, an agreement whereby plaintiff and one Body agreed to purchase the defendant's business.

R. T. D. Aitken, for plaintiff.

I. W. McArdle, for defendant.

STUART, J.:—This action presents some novel features. The plaintiff is an unmarried English woman who, after a visit to Canada, returned to England and by lectures and talks of a semi-private nature induced a number of people to place their money in her hands for investment in real estate in the West, one reason being that it would be safer in case of a German invasion of England.

She was rooming at an apartment house held by the defendant, Graham, under a five-year lease from one Gillis. The defendant, Body, an Englishman, was rooming at the same place. Body had a brother in Medicine Hat who had apparently made considerable money in real estate speculation, but the defendant, Body, himself had practically no money at all. He was running a cigar stand somewhere in Calgary. The plaintiff in the summer of 1913 became very hard pressed for money. She had invested heavily in real estate and had given mortgages. Body had been urging her to give him a power of attorney which she eventually did. He promised to get a large loan of $20,000 through for her but

only on condition that she would take $10,000 of "it" and "go" into partnership with him and buy out the defendant Graham's lease of the apartment house and his furniture and then manage the apartment house together. She agreed to do so because of Body's promises and assurances. A bargain was made with Graham and a solicitor was called who drew up a partnership agreement between the plaintiff and Body and also an agreement of sale between Graham and the plaintiff and Body. The partnership agreement spoke of the object of the partnership being to carry on a rooming house at the place where Graham was carrying on his business but made no special mention of buying Grahams' lease. It stated that the capital of the partnership was to be $20,000 to be contributed by the partners in equal shares. This document was dated 6th October, 1913. The agreement of sale with Graham bore the same date. By that agreement the vendor, Graham, agreed to sell and the purchasers, Dow and Body, agreed to purchase "all the goods, chattels, furniture, fixtures, goodwill and lease of the said business carried on at number 332 6th Avenue West known as Montrose Place" excepting only the personal effects of the vendor, his family and his roomers.

The agreement then went as follows:—

"(2) The price to be paid for the said business, goods, chattels, furniture, fixtures, good will and lease shall be the sum of Twenty Thousand Dollars ($20,000).

"(3) The purchase price shall be paid as follows:—

(a) The sum of Ten Thousand ($10,000) shall be paid in cash by the said William Edgar Body upon the signing of this agreement.

(b) The sum of Ten Thousand Dollars ($10,000) shall be paid by the said Agnes Rollo Dow in manner following: The sum of Two Thousand Five Hundred Dollars ($2,500) in cash upon the signing of this agreement. The sum of Two Thousand Five Hundred Dollars ($2,500) by assuming the indebtedness covered by liens to the Calgary Furniture Company against the furniture in the said rooming house: And the balance, namely the sum of Five Thousand Dollars ($5,000) shall be paid by the said Agnes Rollo Dow within the term of three (3) months from the date hereof with interest at 8 per cent. per annum until paid W. D.

"(4) As security for the payment of the said sum of Five Thousand Dollars ($5,000) the said Agnes Rollo Dow

agrees to transfer to the said William James Graham the following parcels of land, namely:

(Here follows a description of five separate pieces of real estate.)

"All of which property shall, in the event of the said Agnes Rollo Dow failing to make payment of the said sum of Five Thousand Dollars ($5,000) within the said period of three months be absolutely forfeited to the said William James Graham: and the said William James Graham agrees upon payment of the said sum of Five Thousand Dollars ($5,000) within three months to return the transfers of the said property to the said Agnes Rollo Dow: and that he will not in the meantime encumber the said property.

"(5) The vendor agrees to assign the lease of the said premises to the purchasers for all the unexpired term thereon and to obtain the consent of the lessor to the said assignment.

"(6) Upon the execution of this agreement and payment of the sums above agreed to be paid in cash: and upon the execution of such other documents as are agreed to be signed and executed herein, the purchasers shall be entitled to possession of the said premises.

"(7) If the said Agnes Rollo Dow shall not pay the balance of her portion of the purchase money at the time above specified and in all other respects perform the conditions on her part agreed to be performed, the deposit moneys made by her shall be forfeited to the vendor, who may thereupon re-sell her interest in the property at such time and in such manner and subject to such conditions as he shall think fit."

A bill of sale of the furniture as well as an assignment of the lease were executed at the same time but all the documents were left with the solicitor. I infer that the solicitor considered that he was acting for both parties at the time. The defendant, Graham, stated that he did not employ the solicitor and that another firm had always acted for him. But it is significant that the defendant, Graham, is represented in this action by the solicitor's firm and that the documents were produced by that firm. The plaintiff never had possession of them and I think her statement is quite correct that they were supposed to remain with the solicitor until the cash payment was made. The plaintiff had paid $100 in cash a few days before the execution of the docu-

ments but this was upon an option. On the 6th of October, when the documents were signed, Body, gave Graham a cheque for $10,000 drawn on the Canadian Bank of Commerce. He had opened his account with that bank that very morning depositing the sum of $40. On the 10th of October his credit was $87, the largest he ever had there and he had by October 29th withdrawn all but 55 cents. Body asked Graham to hold the $10,000 cheque for a month and also, so the bank accountant stated, stopped payment of that cheque, an action which was probably unnecessary in any case. The plaintiff of course made no payment of $2,500. She had no money whatever to make such a payment. She was depending on Body raising a loan of $20,000 on her property of which $10,000 was to be put by her into the apartment house enterprise. Whether Body thought that this would go as his own $10,000 or was really intending to get the use of the other $10,000 for himself to make his payment or was hoping to raise another $10,000 somewhere does not appear.

At any rate Body never raised any money from any source. Shortly afterwards he disappeared and has not been heard of since.

About a month later the plaintiff began this action to set aside both the partnership agreement and the agreement with Graham on the ground of fraud and misrepresentation.

Body and Graham appeared by the same solicitors but put in separate defences. At the trial, Mr. McArdle said he was appearing for Graham only and that he did not know where Body had gone or where he was.

In so far as the plaintiff asked for a rescission of the partnership agreement it is obvious that she did not need to make such strong accusations of fraud because it was enough that Body had failed to advance his share of the $20,000 capital. In the circumstances she is clearly entitled to a declaration rescinding the partnership agreement.

With regard to her very grave accusations of fraud against Graham I indicated at the close of the hearing that even on her own evidence she had failed to sustain them. But as it was obviously impossible for the plaintiff ever to be able to take up the burden of the purchase alone I suggested to the defendant that he consent to a declaration rescinding the purchase agreement upon payment of his costs and I adjourned in the hope that a settlement would be

made on those terms. On coming into court next morning, however, I was informed that the defendant, Graham, insisted on retention of the properties mentioned in the purchase agreement which had most of them been actually transferred to his name as compensation in damages for the plaintiffs failure to carry out her agreement.

The defendant, Graham, had counterclaimed for the cash payment of $2,500.

There are many reasons why I think the defendant ought not to succeed in his counterclaim even though I think he was not shewn to have been guilty of any of the charges of fraud which were made against him. In the first place, this was a sale of a leasehold interest and a quantity of chattels together. The plaintiff never got possession of anything and on the whole circumstances of the case I do not think the parties intended the property in either the lease or the chattels to pass until delivery of possession. I think the defendant's only remedy was in damages in any case.

In the next place the agreement of sale is drawn in a peculiar way. It is true that Body and Dow agreed to purchase at the price of $20,000, and in an ordinary case that would, of course, mean that each of them were to be liable to pay the whole $20,000. But the agreement goes on to state specifically how and by whom that money is to be paid and it states that $10,000 was to be paid in cash not by the purchasers—but by Body, and that $2,500 was to be paid in cash by Dow.

That being so, while no doubt Dow could not enforce specific performance against Graham without being prepared to pay him his price I am of opinion that Graham could not sue Dow for the $10,000. The agreement specifically states that that sum was to be paid in cash by Body—not by Dow and Body. Neither can it be said that this was merely to shew how much as between themselves Dow and Body were to pay. This was provided for in the partnership agreement already.

It is significant that Graham has not in fact counterclaimed for the $10,000.

It was the obvious intention of the parties and it is expressly stated in the agreement that the execution of the agreement, the payment by Body of the $10,000, and the payment by Dow of her $2,500 were to be simultaneous. I think in the

circumstances Dow had a right to say, "I will not pay my $2,500 unless Body pays his $10,000." The two payments and the making of this agreement are all mutually conditional. When Graham chose to separate the obligations as he did then I think Dow had a right even as against him to say, "I shall not pay my $2,500 until Body makes his payment. It was our understanding that all should be done together. He gave you a worthless cheque. He never paid you a cent. I shall not pay until he does."

I think in all the circumstances we can go further and say that even though the transfers were signed affecting the properties that were to be given as security for the $5,000 still all the documents were left with the solicitor and were left with him pending the payment of the $12,500. The documents were held, if Graham's assertion of the solicitor's position is correct, by that solicitor acting for both parties pending the consummation of the agreement by the making of the cash payment. Certainly the documents were never held for the plaintiff alone.

Then there is more than that. There was given at the trial no evidence that the landlord, Gillis, ever consented to the assignment of the lease. I sent for the parties again after looking into the case and observing this and had Gillis called. He said he was willing to consent provided the parties paid Graham. That is only a conditional consent and it is upon a condition which obviously can never be fulfilled. Body will never pay Graham as every one knows and Dow is not bound to pay what Body separately agreed to pay. If I gave judgment against Dow for $2,500 and she paid the judgment forthwith, she would get no assignment of the lease and no possession of either chattels or the property.

Furthermore, although the claim to set aside the agreement is rested solely on fraud and misrepresentation, I think it must be obvious even to the defendant Graham that the agreement was an improvident one. With interest on the money invested and the rent to be paid there was little chance of profit even on Graham's own statement of his earnings. But aside from that, the absolute transfer to Graham of so much property as security and the extremely stringent forfeiture clauses in the agreement—so severe as to be, of course, certain to be given no effect, except as security, by the courts—suggest very little care for the

interest of the purchaser on the part of the solicitor if he was really acting for her.

I think, therefore, the proper judgment to do justice in this case is to dismiss the claim against defendant Graham is so far as it rests upon fraud and misrepresentation, to dismiss the counter-claim and to declare that the agreement was never concluded and that the documents should be delivered up and cancelled. I put this last upon the ground that it was clearly shewn that Body will not and cannot pay his $10,000 and that that payment by him was intended to be a condition precedent to the initiation of the agreement both in favour of Graham (Knight v. Cushing) and, owing to the special form of the agreement, also in favor of Dow. I place it also upon Dow's right to the assent of the landlord which it is obvious will never be given. I am not sure that she was bound to pay anything until that assent was assured but even if she had paid the $2,500 it is clear from the statement of Gillis that the asset would not have been given till Body had paid. So if she had paid the $2,500 and the circumstances were otherwise the same, I think she would now be entitled to get it back owing to Body's default. Graham chose to look to Body separately for a cash payment of $10,000. Both possession and legal title depended on Body making that payment and as he has not made it and admittedly never will the plaintiff never got, and never can get, either possession or title (except, of course, by paying the $10,000 which she never agreed to do). It is possible that some of the reasons I have given could only have force as answers to the claim for judgment for the $2,500.

But even if I were to assume that there was a right at any rate to damages, I am of opinion that the defendant did not adduce proper evidence upon that point, he merely gave general evidence as to the present profits of the business, as compared with former profits. If the property had all been chattel property, the measure of damages would have been the difference between the purchase price and the selling value of the goods in the market at the time of the breach. Part of the property was a leasehold interest and it is a difficult question to determine what the measure of damages in such a case would be. The purchase price was not separated so as to shew how much was to be paid for the chattels and how much for the lease. This introduces an element of great difficulty. Another element of difficulty

would be to determine how much of the damage had been caused by the plaintiff's failure to keep the covenant and how much by Body's failure to keep his. As a matter of fact, I think perhaps all the damage was caused by Body's failure, for if $10,000 had been paid in cash, it is certain, it seems to me, that the $2,500 from the plaintiff would have been arranged somehow.

Owing to her unsustained accusations of fraud against Graham I think the plaintiff should pay Graham's costs of the action and that there should be no costs of the counter-claim. The plaintiff will have judgment over against Body both for her own costs and for the costs given against her in favor of Graham. His default was the main one and was really the cause of the whole trouble. The defendant, Graham, will be directed in the judgment to reconvey to the plaintiffs all the properties conveyed to him by the plaintiff by way of security upon payment of his taxed costs.

All the facts concerning the case came out at the trial and any necessary amendments of the pleadings to sustain this judgment ought to be made.

The defendant, Graham, himself asked for an amendment so as to counter-claim for damages but, as I say, I think his evidence was in any case not directed to the right point.

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

SETTER v. THE REGISTRAR.

Land Titles Act—Secs. 105 to 108—Caveat—Erroneous Registration—Land — Definition of — Mortgage — Remedy against Assurance Fund — Persons entitled to — Certificate of Title — Application for — Person acquiring the Title to Land—Action for Damages not Barred by Proceeding on Covenant in Mortgage—Concurrent or Alternative Remedies.

M. and R. were purchasers under an agreement for the sale of land registered in the name of the H. B. Co. The plaintiff was holder of a mortgage (for which he held other security) on the undivided half-interest of M. and caused a caveat to be filed. Through an error or omission of the Registrar the caveat was wrongly registered against other land. When the transfer from the H. B. Co. to M. and R. was registered the caveat was disregarded and the land subsequently sold by M. and R. as unencumbered. R. was unaware of any encumbrance. Plaintiff had obtained final judgment against M. for the unpaid amount of the mortgage but the Sheriff had made a return of "*nulla bona.*" The plaintiff sought under sec. 108 of the Land Titles Act to recover the amount of his judgment out of the assurance fund.

Held, that "land" in sec. 105 includes any part thereof and every estate and interest therein legal or equitable.

Held, that an agreement for sale or a mortgage registered or unregistered created an interest in land.

Held, that the remedy against the assurance fund is confined to cases where the title to the land in question has been registered under the Act and does not extend to land the titles of which appear in the Land Titles Office but for which no certificate has been issued.

Held, that plaintiff, being deprived of his interest as mortgagee, was a person entitled to bring an action for damages under sec. 105 against the person who acquired title to the land through the error or omission of the Registrar.

Held (STUART, J., dissenting), that R. being entitled to a half interest in the land free was not a person who acquired title to the land through the omission of the Registrar and that the words "person on whose application the erroneous registration was made" refer solely to cases of formal application where the land has not been registered under the Act.

Held, that it is a condition precedent to plaintiff recovering from the assurance fund the amount of an abortive judgment obtained under secs. 105 or 107 that the action under those sections be expressly for damages inasmuch as the net loss only can be charged to the fund.

Held, that an action on the covenant in the mortgage cannot be treated as an action for damages but does not bar one from being subsequently brought.

Held, that there is no concurrent or alternative remedy against the Registrar under sec. 108 of the Act.

Per STUART, J. (dissenting) :—"Application" in sec. 105 means written application but is not confined to applications to bring land under the Act.

2. R. was a person who acquired a title through the omission inasmuch as he took a registered interest in the whole of the land and was a necessary party to a transfer of M.'s interest and that therefore the plaintiff was entitled to recover under sec. 108 by reason of his action against R. under sec. 105 being barred.

An appeal from a judgment of the Chief Justice dismissing an action by the respondent against the Registrar to obtain compensation from the assurance fund for loss arising out of an omission of the Registrar to properly record a caveat.

The appeal was heard by SCOTT, STUART, BECK & SIMMONS, JJ.

A. H. Clarke, K.C., for appellant.

E. P. Edwards, K.C., for respondent.

BECK, J.:—This is an appeal from the judgment at the trial of the learned Chief Justice. I quote from his reasons for judgment his summary of the material facts:—

"In October, 1909, one Meyer gave a mortgage to the plaintiff on an undivided one-half interest in the south-east ¼ 26-31-2, west of the 5th meridian to secure $2,016 the purchase price of certain machinery.

"At the time the mortgage was given the title to the said land stood in the name of the Hudson's Bay Company, Meyer and another being the purchasers under an agreement of sale assigned to them upon which there was a small balance still unpaid. The plaintiff being unable to register the mortgage caused a caveat to be filed under which he claimed to be interested as mortgagee under his unregistered mortgage. As required by sec. 86 of the Land Titles Act, the registrar caused a memorandum of the caveat to be entered on the certificate of title standing in the name of the Hudson's Bay Company, but by error the land was described as section 23 instead of section 26 and, in consequence, when the transfer from the Hudson's Bay Company to Meyer and his co-owner came in to be registered, the caveat was disregarded and no memorandum of it was noted on their certificate. The land was subsequently sold as unencumbered, but the mortgage was not paid though there was a small amount paid on it at one time. The plaintiff recovered a judgment against the mortgagor for the amount unpaid, but the sheriff has been unable to realise anything on the execution to which he has made a return of nulla bona.

"The notice provided by sec. 108 of the Land Titles Act was given and this action was then begun against the registrar as nominal defendant."

For a decision of the case it is necessary to consider several sections of the Land Titles Act (ch. 24 of 1906) especially secs. 105 to 108.

Though long, I think it best to quote sec. 105 in full. It is as follows:—

"105. After a certificate of title has been granted therefor, any person deprived of any land" (1) "in consequence of fraud or (2) by the registration of any other person as owner of such land, or" (3) "in consequence of any fraud, error, omission, or misdescription in any certificate of title or in any memorandum thereon or upon the duplicate thereof, may, in any case in which the land has been included in two or more grants from the Crown, bring and prosecute an action at law for the recovery of damages against such person as a judge appoints, and in any other case against the person upon whose application the erroneous registration was made, or who acquired title to the land in question through such fraud, error, omission, or misdescription:

"Provided always that except in the case of fraud or error occasioned by any omission, misrepresentation, or misdescription in the application of such person to be registered as owner of such land, or in any instrument executed by him, such person shall, upon a transfer of such land bona fide for value, cease to be liable for the payment of any damages which but for the transfer might have been recovered from him under the provisions hereinbefore contained, and such damages, with costs, may in such last mentioned case be recovered out of the assurance fund hereinafter provided for, by action against the registrar as nominal defendant."

By the interpretation section (2 (a)) "land" includes "every estate or interest therein and whether such estate or interest is legal or equitable." That an interest on land is created by an agreement for sale (which cannot be registered except by way of caveat) or by a mortgage whether registered or not is settled by such cases as Wilkie v. Jellett, 26 S. C. R. 282; McKillop v. Alexander, 45 S. C. R. 551; Smith v. National Trust Co., 45 S. C. R. 618 and Yockney v. Thompson, 50 S. C. R. 1.

The words which in the first instance require most careful consideration are "After a certificate of title has been granted therefor, any person deprived of any land, &c."

"Therefor," obviously refers to "land." The sentence can therefore be reconstructed so as to read: "After a certificate of title has been issued for a particular parcel of land, any person deprived of the land comprised in the certificate of title, &c." And the word "land" in the second instance must as the whole includes all its parts, include "or any part thereof or interest therein;" for it would be absurd that where the condition had arisen, i.e., "after a certificate of title has been issued for a particular parcel of land" only a person who had been deprived of his entire interest in the land should have a remedy. Of course no such proposition is put forward; and I have met it because I think its statement makes the alleged difficulty appear to be less serious than it is to my mind. The section (105) gives a remedy in certain cases against the assurance fund established under the Act for, speaking generally, the indemnification of persons damnified by mistakes of the registrar.

The present Land Titles Act though the first passed by the Legislature of Alberta is in fact a revision of one passed in 1886 by the Parliament of Canada for the North-West Territories, out of which the province of Alberta was carved and constituted, which was amended from time to time. Prior to 1886 there had been a system of registration established under an ordinance of the North-West Territories. The Dominion Act of 1886 while introducing the "Torrens system" did not abolish the older system of merely recording instruments so that for some time both systems continued concurrently. Subsequently it came to be enacted that no instrument of title could be received for registration unless the existing title were first registered under the Act, that is, until a certificate of title had been issued to the applicant; and inasmuch as in 1906 there might remain cases in which land had not yet been registered under the Act, provision appears in the present Act for this being done in such cases (secs. 27 et seq.); and furthermore it was not unreasonable to suppose when the present Act was passed that titles to properties appeared in the Land Titles Offices for which no certificate of title had yet been issued.

In respect of any such titles it is obvious that the assurance fund was not intended to be available; but available only and in respect of registrations made "after a certificate of title had been issued therefor" that is for the land in respect of which the claim against the assurance fund is made. With deference to the learned Chief Justice it seems to me that this is the clear purpose and intent of the opening words of sec. 105 and at the same time their proper grammatical construction. No doubt some plainer expression might have been used.

Section 27 says that the owner, &c., "may apply to have his title registered under the provisions of this Act."

Section 36 uses the expression "after the registration of a title," i.e., in pursuance of an application under sec. 27.

The application for the registration of a title, if successful, results in the issue of a certificate of title for the land.

In order, therefore, to express the idea that the remedy against the assurance fund is confined to cases where title has been registered under the Act, the words "After a certificate of title has been issued for the land" are undoubtedly fit and apt; and perhaps more apt than an attempted adaptation of either of the other expressions I have quoted; for in both instances the words are used to signify the registration of the particular title of the applicant and not the wider idea as often expressed popularly of the land being brought under the Act; an idea quite correct but nowhere so or similarly expressed in the Act and therefore used only to express the result consequent upon the particular title of a particular person becoming registered either as original patentee or as an applicant for registration of a title depending upon a patent issued prior to a certain date stated in the Act, being the date when it became compulsory that titles should be brought under the Act before being dealt with by instruments of title.

In my opinion, therefore, the condition for the application of sec. 105 existed namely, a certificate of title had issued for the land.

The plaintiff is a person deprived of an interest in the land, namely his interest as a mortgagee, in consequence of an error or omission in a certificate of title, namely, the omission of the entry of a memorandum of the plaintiff's caveat and was therefore entitled to bring and prosecute an

action at law for the recovery of damages against the person who acquired title to the land in question through such error or omission.

In my opinion the words "the person upon whose application the erroneous registration was made" refer not to a person, e.g., asking for the cancellation of a certificate of title and the issue of a new certificate of title upon a transfer but solely to the case of the formal application, so designated, of a person for the registration of his title where the land has not yet been registered under the Act (secs. 32 et seq.), and I think, too, the whole of the exception contained in the proviso to the section is confined to such an application, (or to like formal applications:—e.g., under sec. 74, (Transmissions). But Meyer & Rapier to whom the certificate of title upon transfer from the Hudson's Bay Company was issued acquired a clear title to the land through the error or omission of the Registrar to endorse a memorandum of the plaintiff's caveat protecting his interest as mortgagee. Rapier, however, was entitled to an undivided half-interest in the land free from the caveat; for the mortgage affected only Meyer's half-interest and there is no allegation nor anything to shew that Rapier had knowledge of the mortgage or of the caveat so as to make him a party to fraud on Meyer's part. I think, therefore, that Rapier did not occupy such a position as to come within the sense of the words of the Act and that the plaintiff's right of action under sec. 105 was against Meyer only. This too seems to have been the view of counsel for the plaintiffs for an action was brought by the plaintiffs against Meyer alone.

If, therefore, the plaintiffs had brought "an action at law for the recovery of damages" against Meyer under sec. 105, I think that upon shewing a judgment and execution and a return of nulla bona and producing a certificate of the judge who tried the case he would have been entitled to payment of his claim by the Provincial Treasurer in pursuance of sec. 107 which I quote for it calls for some further consideration:—

"107. If the person against whom the action for damages is directed to be brought as aforesaid is dead or cannot be found within the province, an action for damages may be brought against the registrar as nominal defendant for the purpose of recovering the amount of the said damages and

costs against the said assurance fund; and in any such case, if final judgment is recovered and also in any case in which damages are awarded in any action as aforesaid and the sheriff makes a return of nulla bona or certifies that any portion thereof, with costs awarded, cannot be recovered from such person, the Provincial Treasurer upon receipt of a certificate of the judge before whom the said action was tried shall pay the amount of such damages and costs as are awarded or the unrecovered balance thereof as the case may be and shall charge the same to the account of the said assurance fund."

The plaintiffs did in fact bring an action against Meyer but it was not one for the recovery of damages but one upon the covenant in the mortgage. Judgment by default was obtained, execution issued and returned nulla bona.

I was inclined, as a first impression, to the view that that action might be treated as an action for damages under secs. 105-7, inasmuch as all actions are now "formless" and the amount recovered would in this case perhaps be the same, but, on further consideration, I have come to the conclusion that this is not so.

It does indeed, at first sight, seem strange that the plaintiffs should be compelled, in order to reach the assurance fund—not necessarily to forego their obvious simple remedy against Meyer upon his covenant, but ultimately at least—to proceed against him in an action setting up all the special circumstances called for by the Act, but the combination of several reasons, it seems to me, makes the requirement of this course clearly reasonable. In the first place, the words of sec. 105 are, as might be expected, general, so as to apply to all classes of cases, in most of which probably no such simple and direct remedy against the person responsible for the fraud, error or omission existed and the case of the double remedy may well have been overlooked or considered as likely of not so frequent occurrence as to make special provision necessary. Again, I think the intention is that the assurance fund should be liable only for the real ultimate net loss to the person damnified. In the present case, the plaintiffs had in fact additional security from Meyer. In the action on the covenant, the plaintiffs were entitled, of course, to a judgment for the whole amount owing on the covenant, irrespective of the value of their other securities, and in the result it might have turned out that, by reason of

the further securities, no loss would be ultimately sustained. That the judgment, the amount of which is to be paid from the assurance fund, is intended to be only for the ultimate net loss is, I think, made clear by sec. 111, which provides for the recovery by the Registrar of the amount paid out of the assurance fund. The provision is long and detailed and yet there is nothing providing for or suggesting the Registrar's right to the benefit of any collateral securities, to which the original plaintiff had a right to look. I think, therefore, that in order to reach the assurance fund, the plaintiffs were bound to bring their action against Meyer as one expressly for damages given them by sec. 107, and in that action to shew their ultimate net loss and that only upon a return of execution nulla bona in such an action and the certificate of the judge who tried the action are the plaintiffs entitled to payment by the Provincial Treasurer under sec. 107.

I think that the plaintiffs had not a concurrent or alternative remedy under sec. 108 by a direct action, as the present action is, against the Registrar, as nominal defendant for damages by reason of the words "in any case in which remedy by action for recovery of damages hereinbefore provided is barred." These words clearly refer to the action for damages referred to in secs. 105, 106 and 107.

Earlier words in the section provide that the plaintiff must be a person "who, by the provisions of this Act, is barred from bringing an action of ejectment or other action for the recovery of land." These words obviously refer to the provisions of sec. 104. The plaintiff is barred from the actions mentioned in sec. 104, but not from the action for damages mentioned in secs. 105, 106 and 107. As this is an action under sec. 108, I think it is clear that the plaintiffs cannot succeed in the action and that it must be dismissed, but on the argument we were given to understand that the Government, as well as the plaintiffs, wished an opinion upon the meaning and effect of secs. 105, 106 and 107, and it is for this reason that I have discussed those sections at such length.

A question may be raised whether or not the plaintiffs having elected to sue Meyer upon his covenant is not now barred—not by virtue of statutory provision—but by their own conduct from now suing him under the statute. I am of opinion that they are not barred. I see no reason why a person in the position of the plaintiffs should not before

proceeding with his statutory remedy against his debtor which in effect is a remedy against the assurance fund proceed personally against the debtor upon all grounds of claim and upon all securities and delay his statutory action until he has by means of such personal actions ascertained his ultimate net loss, for which only he then looks to the assurance fund. As the Registrar—or rather the Government whom he represents—have in this action been anxious for a judicial opinion upon the questions incidently arising on the action and which I have discussed, I think the action should be dismissed without costs.

SIMMONS, J.:—The plaintiff resides at Portage la Prairie, in the Province of Manitoba, and has brought this action nominally against the Registrar to obtain compensation out of the assurance fund for loss arising out of the mistake of the Registrar at Calgary, who registered the plaintiff's caveat against another parcel of land, instead of against the lands described in the caveat.

The plaintiff sold a threshing outfit, consisting of an engine, separator, tank and other equipment to one Frederick Meyer. The purchaser executed a mortgage upon his undivided one-half interest in the south-east quarter of section 26, township 31, range 2, west of the 5th meridian in the Province of Alberta, to secure the purchase price of $2,116 and also executed a chattel mortgage collateral to the real estate mortgage upon the goods sold to secure said sum.

The purchaser of the machinery was not registered owner of the lands in question. but he and one Rapier had purchased together the south half of said section under an assignment of an agreement for sale from one Pearson, who had purchased from the Hudson's Bay Company.

At the time the sale of the threshing outfit was made, Mayer told the plaintiff that he was the owner of a half interest in the half section and he had the choice of which quarter he would take and he had selected the south-east quarter and the mortgage was, therefore, taken by the plaintiff upon this quarter section. If such right of division of interest existed, Meyer apparently did not exercise it as his partner Rapier says there never was any division of interest between them (page 60, line 19). The half section was sold for $25 per acre and Rapier and Meyer divided the proceeds

equally. The transfer for the half section issued to the two men, Rapier and Meyer, from the Hudson's Bay Company, and they jointly transferred to the purchasers from them. The mortgage given by Meyer is upon his undivided half interest in the southeast quarter of said section, and it is obvious that Rapier, who was innocent in the matter and who did not know of Meyer's mortgage was not liable to any action by the mortgagee Setter and obtained no advantage through the absence of endorsement of the plaintiff's caveat upon the certificate. The plaintiff's action is, therefore, in my opinion, improperly brought under sec. 108 of the Act. The plaintiff is, upon the facts, entitled to his remedy and to compensation from the assurance fund, if he brings an action for damages against the person chargeable with fraud upon the ground that he is "a person deprived of any land in consequence of fraud."

Section 105 provides that "After a certificate of title has been granted therefor, any person deprived of any land in consequence of fraud or by the registration of any other person as owner of such land, or in consequence of fraud, error, omission or misdescription in any certificate of title or in any memorandum thereon or upon the duplicate thereof," may prosecute an action for the recovery of damages against (a) such person as a judge appoints where land has been included in two or more grants from the Crown; and (b) against the person upon whose application the erroneous application was made; and (c) against the person who acquired title to the land in question through such fraud, error, omission or misdescription.

The proviso to this section is applicable to class (b) only, namely, "fraud or error occasioned by the omission, misrepresentation or misdescription in the application of such to be registered as owner."

Those who must make an application to be registered as owner are: (1) Those who apply pursuant to secs. 27-36 (Form E) to bring land under the act, and (2) Those who apply to become registered owners pursuant to secs. 74, 75, 76, 77, 78, 79, 80, 82, 83 and 83A, relating to transmission of title upon death; sale under execution or for taxes, registration in consequence of marriage of female owner and transmission under assignment for benefit of creditors.

Those who acquire title without an application to be registered as owner obviously are those who obtain a transfer

or lease, as the case may be, from the registered owner and to give the instrument to the Registrar for registration and if the instrument is in the form required by the Act and the duplicate certificate of title is produced, the Registrar registers the instrument without any application to be registered as owner.

It is quite clear that an action against class (b) would be barred upon a transfer of such land bona fide for value, except in the case of fraud or error occasioned by any omission, misrepresentation or misdescription in the application of such person to be registered as owner of such land and the proviso in sec. 105 makes the assurance directly accessible under sec. 108, where there is no fraud or error chargeable to the person who makes the application, as an action against such person is barred at the moment he transfers the land bona fide for value.

In the case under consideration, Meyer obtained title by transfer from the Hudson's Bay Company who were registered owners. No application to be registered as owner was required. The right of action against him falls under (c) namely, "Who acquired title to the land in question through such fraud, error, omission or misdescription," and the proviso in sec. 105 has no application. The Registrar omitted to register the plaintiff's caveat and Meyer fraudulently took advantage of the omission which enabled him to dispose of the land and obtain the purchase price and defeat the mortgage which he had executed against the land. Section 105, therefore, gives the plaintiff a statutory right of action against Meyer for damages.

Section 107 provides: "In any case in which damages are awarded in any action as aforesaid and the Sheriff makes a return of nulla bona . . . the Provincial Treasurer shall pay the amount of such damages and costs. . . ."

The plaintiff, as a condition precedent to the right of having his damages paid in this way, must prosecute an action against Mayer pursuant to sec. 105. This he has not yet done. He has sued upon the covenant in the mortgage and obtained judgment and execution and a return of nulla bona thereunder by the Sheriff, but this cannot be construed as an action pursuant to sec. 105, as the remedy given therein is a statutory one, and the Statute must be strictly followed.

In the result, then, I cannot agree with the interpretation of the secs. 105, 106 and 108 of the Act assigned to them by the Chief Justice in the judgment appealed from.

The interpretation of the word "land" in sub-sec (a) of sec. 2 is quite wide enough to include any interest in land, and the opening words of sec. 105, "after a certificate of title has been granted therefor," means after land has been brought under the Act. The same term is used in sec. 41, where obviously it means "after land has been brought under the Act." I concur, therefore, in the result of the judgment of Beck, J.

STUART, J.—I was at first inclined to agree with the learned Chief Justice in his opinion that, under sec. 105 of the Land Titles Act, a mortgagee who had been deprived of the security of his mortgage by an omission of the Registrar could not maintain an action for damages. But, after argument and upon consideration, I have concluded that the opening words of that section can and should properly be given an interpretation wide enough to protect such a mortgagee. The question turns upon the meaning of the words "after a certificate of title has been granted therefor, any person deprived of any land, etc., etc." The view taken by the Chief Justice, as I understand it, is that the word "land" in this phrase must, as applicable to the present case, be taken to mean merely "an interest in land such as a mortgagee enjoys under his mortgage," that the preceding word "therefor" refers by anticipation to this interest only, and that as no certificate of title was granted to the mortgagee or to anyone for such interest, therefore, the section does not cover his case.

In addition to the other reasons which are given by my brother Beck, it seems to me that one very valid argument against such a view may be rested upon the proper interpretation of the whole expression "deprived of any land." I do not think it is by any means an impossible or improper interpretation of these words to make them cover the loss of a right of way of security upon the land. If one has a chattel mortgage—or perhaps it would be more exactly parallel to say a lien—upon goods as security for a debt and someone steals or destroys the goods, surely the person who has the lien can quite properly be said to be deprived of those goods. In the case of a lien, he may not have the legal estate, but he would certainly feel quite certain that he had in a very real sense been "deprived" of the goods. It is true that in the case of a lien on chattels, there must be

possession and that a mortgagee of land has under our Act only a charge on the land and not necessarily possession. But he has usually at least a contingent right of possession which for the present purpose must amount to practically the same thing. I think any mortgagee of land would consider himself "deprived of the land" if his mortgage security were destroyed. And it is this wider and more general sense that I think that expression should be taken.

With respect to the main point involved in the appeal, the right of the plaintiff to maintain an action under secs. 108 and 105 rests admittedly upon the possibility of his saying that he was given an action against Rapier by sec. 105, but that owing to Rapier's having made a bona fide transfer of the property, that action is barred by the proviso at the end of the latter section.

Now, referring to the proviso first, it is obvious of the that the principle underlying it is this: First, if there is fraud, a person guilty of it will still remain liable, even if there has been a transfer. Second, if there has been an "error occasioned by any omission, misrepresentation or misdescription in the application of such person to be registered as owner of the land or on any instrument executed by him," such person must also remian liable, even if he has made a bona fide transfer. If the mistake has been his, if he has caused the error through some misdescription, omission or misrepresentation (even though innocent) in his documents, produced a transfer, does not relieve him. He must bear the burden of his own mistake which led to the mistake in the office. But, in every other case, the person, whoever it is, who is made liable by the main part of the section, is relieved if he has made a bona fide transfer, and then by the concluding words of the proviso an action is given against the Registrar instead.

This means that, even though a man has been guilty of no fraud and guilty of no mistake in his documents produced, he may still be liable to an action under the main part of the section if he comes properly within its terms as long as he still holds the property. And, of course, in justice, he should be so liable, because, in such a case, it is still in his power to correct the error, and if, out of what must be clear perversity, he refuses to do so, he ought to be made liable. Just why the error in such a case could not have been left to be corrected by an order of the court in an action for

that purpose only is not, to my mind, very clear, but at any rate, a right of action is created and I cannot see that that right is confined to the case of misdoing or negligence or fault in the statutory defendant. Clearly it is not so confined.

Now, it is admitted that Rapier was guilty of no fraud and it is not suggested that the error was occasioned by any omission, misdescription or misrepresentation in any application of his or in any instrument executed by him, so that, therefore, if there ever was an action against him at all, he is relieved owing to his bona fide transfer for value. An action is, therefore, given, either under the concluding words of the proviso to sec. 105 or under sec. 108, against the Registrar, in case there ever was any right of action against Rapier.

The first enquiry that I proceed to make is whether Rapier comes within the meaning of the words "the person upon whose application the erroneous registration was made." I have, upon consideration, and with the assistance of the observations made by my brother Beck, whose judgment I have had an opportunity of reading, come to the conclusion that he does not. I think, particularly in view of the wording of the proviso, that the word "application" must be interpreted to signify a written application of some kind. I am unable to see how there could be a "misdescription" in any verbal application within the meaning of the proviso. The expression "make application to be registered as owner" is used in several parts of the Act, and it has in every case obviously reference to a written application of some kind. I do not think, however, that the expression can be or ought to be confined to an application to bring land under the Act, because a written application to be registered as owner is referred to in secs. 74 and 75, and it seems to me quite clear that the words "upon whose application the erroneous registration was made" are quite wide enough to cover such a written application as is there referred to. Confining interpretation of the words, then, to the case of a written application of some kind, it is admittedly the case that Rapier made no such written application and that there never was any right of action created against him upon that ground.

I have, however, much greater difficulty in dealing with the question whether Rapier did or did not "acquire title to the land in question through such . . . omission," as stated in the concluding words of the main part of sec. 105.

It seems to me that some confusion has arisen from the fixing of attention somewhat too strongly upon the real respective beneficial interests of Meyer and Rapier, instead of upon the registered title obtained by them owing to the omission of a proper memorandum of the plaintiff's caveat. It is argued that Rapier never got any title which he would not have been entitled to get, even if the caveat had been filed. And this consideration impressed itself strongly upon my mind for some time. There is also a not unnatural hesitation in giving any interpretation to the section which would have left Rapier open to the action for damages which is a pure statutory creation when it is admitted that he was entirely innocent in the matter. But it must be remembered that the action is a statutory one, created, not by the justice or equity of the ordinary law, but by the legislature in a certain specified case. If Rapier comes fairly within the meaning of the words and an action is given against him, I hardly think the court should hesitate to declare him so to be within its meaning, merely because, in our opinion, it was an unjust thing for the legislature to do. Moreover, in this particular case, the action created by the statute would only exist against Rapier, while the title remained in the joint names of him and Meyer. At that stage, nothing would have prevented the plaintiff filing another caveat or getting the Registrar to put the old one right and any damages suffered by the plaintiff would only have amounted to the expense or trouble to which the plaintiff might have been put in getting that arranged. There is nothing much to shrink from in such a contingency. Practically speaking, no such action, even if technically existing, would ever be brought. Persons in Rapier's position are protected, if they have acted bona fide, as soon as they have transferred the land bona fide for value. In view of the wording of sec. 106, it seems to me the court might not improperly take a broad view of the expression "bona fide transfer for value," so as to cover the case, even of a mortgage for value. Section 2, sub-sec. (c), indeed, itself interprets "transfer" to mean "the passing of any estate or interest in land under this Act." So that the case of a mortgage is actually covered in this way.

Practically, therefore, the existence, during one period of a hypothetical right of action against a person in Rapier's position is merely made a peg upon which to hang a right

of action against the registrar. When the whole purpose of the Act is to protect persons who rely upon the registry system to which they are really compelled to resort, from mistakes of the officials and to create a feeling of absolute confidence in registered titles, I think no fear of any injustice in the creation or maintenance of a right of action against a person in Rapier's position during a period when ex hypothesi the damages could in any case be only very minute and, also ex hypothesi, would scarcely ever be claimed, should not deter us from asserting that there was at one time such a right of action when the only present result will be to establish one against the registrar and practically the insurance fund, which was created just for the purpose of such cases as this.

Now, can Rapier be fairly said to have acquired a title through the omission. It seems to me that, if we keep our eyes steadily upon the question of "title," that is, of the title as disclosed on the face of the registry and quite apart from Rapier's real beneficial interest as between himself and Meyer, he can quite properly be said to have done so.

The Hudson's Bay executed a transfer to Meyer and Rapier jointly and the transfer did not specify their restrictive interests. The certificate of title, issued to them upon that transfer, did not specify their respective interests. It does not seem to have been filed as an exhibit, only an epitome of its contents being given. But I have taken the liberty of making sure upon the point by having the Registrar produce the certificate to me and it only confirms what would otherwise be the necessary inference, viz., that Meyer and Rapier were stated to be "the owners of an estate in fee simple" in the south half of the section. It seems to me that the effect of this is that Rapier and Meyer together acquired a title., i.e., a registered title to the whole. That, of course, is quite distinct from beneficial interest. So far as the face of the title goes, Rapier might have had an eighth and Meyer seven-eighths, or any other proportion. The situation is not different from what it would have been if at the request of Meyer and Rapier the Hudson's Bay Company had issued a transfer to John Smith and Thomas Jones jointly, and there had been a separate agreement between Smith and Jones and Meyer and Rapier that the two former would hold as bare trustees for Meyer and Rapier in certain proportions. Smith and Jones would have acquired a title

certainly enough. So here, I think, Meyer and Rapier must be treated, so far as the registered title is concerned, as trustees for themselves, according to their real interests. But all the same, they jointly have a registered title to the whole half section and the whole estate. That Rapier had a title covering the interest of Meyer must be clear, when we consider that Meyer could not possibly have conveyed a half interest by a transfer signed merely by himself. Rapier was a necessary party to any such transfer, and did in fact join in both transfers that were subsequently made. With respect to Meyer's interest, he was a bare trustee for Meyer, it is true. But he had a certificate of title in his name and it covered Meyer's interest. And by the omission to make the proper memorandum of the caveat, he acquired a more complete title, so far as Meyer's interest was concerned, than he otherwise could have obtained. He obtained a title free of the caveat and he was thereby enabled to join in and execute a transfer to cover and convey, free of encumbrance, Meyer's interest to the purchasers, which he could otherwise not have done.

Although this reasoning may appear somewhat technical, it does seem to me that that consideration should not be an obstacle, especially when the only purpose of holding that there was once a right of action against Rapier is to secure a foundation for an action against the Registrar. The final objection to this view which has been pointed out to me lies in the provisions of sec. 111, which give the Registrar a right of action over against a person when any money has been paid on his account. It would be unjust to allow the Registrar to recover over against Rapier, who is entirely innocent. But even this difficulty can, I think, be avoided by a very fair construction of the words "on account of any person." Even though the original action was against Rapier, it was only because he was trustee for Meyer and the payment by the registrar could, I think, quite properly, in such a case, be held to have been made on account of Meyer after all.

If we suppose the case of a caveat being attempted to be filed against lands of which A. is the registered owner and a failure, owing to an omission of the registrar, and then a transfer by A. to B., the latter being merely a bare trustee, either for A. or for some other party D., and innocent of any wrongdoing or fraud; and then an innocent transfer for value by B.; say, at A.'s or D.'s request to C.; which would

bar the action against B.; in this case, B. is a bare trustee and yet he is the person who has acquired title owing to the omission, and it is against him that the action would be given by the Statute. Surely in such a case, the remedy under sec. 111 given to the Registrar would be against the A. or D., as the person on whose real account the money would have been paid, although, in the first instance, the technical statutory action was against B.

I admit that this sec. 111 presents some difficulty, but I think it could be overcome in the way I suggest. Aside from that difficulty, it seems to me fairly clear that Rapier did acquire an unencumbered registered title covering Meyer's interest owing to the omission, and that there was a right of action against him.

For these reasons, I think, the appeal ought to be allowed with costs, but that the conditions as to proving damages suggested by the prevailing judgment ought, even in such a case, to obtain.

SCOTT, J., concurred with BECK, J.

Appeal dismissed.

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

LEE v. SHEER ET AL.

Vendor and Purchaser—Action for Specific Performance Brought by Vendor—Failure to Make Title to Minerals in Land—Right to Rescind—Compensation—Abatement—Specific Performance and Payment May be Ordered in Same Order.

In an action brought by the vendor for specific performance of a contract for the sale of land containing minerals, it was *held*, that the purchaser should be discharged from the said contract unless the vendor made a good title to the minerals, failure to make a good title thereto not being such a trifling defect of title to the land in which they were situated as to make it fair that the vendor should be permitted to hold his contract subject to compensation or abatement of the purchase-money.

Halket v. *Earl of Dudley*, [1907] 1 Ch. 590, referred to.

Held, that an order for specific performance and an order for payment of the balance of the purchase-money might be embodied in the same order.

Schurman v. *Ewing*, 7 W. L. R. 610, over-ruled.

Hargreaves v. *Security Investment Co.*, 29 W. L. R. 317, not followed.

An appeal from the order of WALSH, J., ordering payment by defendants, the purchasers, in an action brought by the plaintiff as vendor of land for specific performance and for an order for personal payment against the purchasers.

The appeal was heard by BECK, SCOTT, and SIMMONS, JJ.

A. V. G. Bury, for plaintiff, respondent.

C. C. McCaul, K.C., for defendant, appellant.

BECK, J.:—An appearance was entered for four of the five defendants but none for the defendant Wilton, who was one of the purchasers. A statement of defence was delivered by one of the defendants—Hacket.

A notice of motion for judgment was given to the defendants who had appeared.

On the 30th April, 1914, an order was made by Walsh, J., (1) ordering payment by the four purchasers of the whole balance of purchase money and interest, $9,261.48, together with the costs, and (2) providing for payment to the plaintiff or into court of this amount and the costs with interest within one month of service of the order and for transfer in case of payment

The order of Mr. Justice Walsh was made in presence of and without objection by the solicitor for the four defendants who entered an appearance.

On the 30th of June, 1914, default in payment being shewn, an order was made by Stuart, J., for the sale of the land by public auction, fixing a time and place and the form and method of publication of the notice of sale.

In passing, I remark that in all cases coming before me I have made the final order for sale in the form of an order for sale with the approbation of a judge without more, leaving all further proceedings to be dealt with separately on the foundation of the general order for sale and thus leaving it open to sell either by public auction or private sale in or out of court either on the first application or subsequently in the event of the method adopted proving abortive.

The sale in pursuance of Mr. Justice Stuart's order did in fact prove abortive.

On the 31st day of July, 1914, two of the defendants who had entered an appearance—Elisa Scheer and Margaret Fairweather—the present applicants and appellants, moved before Ives, J., for an order to set aside the order of Mr. Justice Walsh and an application on behalf of the plaintiff for a new order for sale by public auction, etc., came on at the same time. Mr. Justice Ives directed both these applications to stand over and to come on along with a motion on behalf of the present applicants and appellants for an order extending the time for appealing from the order of Mr. Justice Walsh and for moving the Court en banc for an order setting aside that order and allowing them to defend and also setting aside the order of Stuart, J., for sale. Mr. Justice Ives made an order extending the time for appeal as asked and adjourning the plaintiff's application for a new order for sale.

The present applicants and appellants then moved this court by way of appeal from the order of Walsh, J., and by way of substantive motion for an order setting it aside and allowing them to defend; and on the argument counsel for them asked that the notice of motion be amended by asking in the alternative for an order to discharge the defendants, the purchasers, from the contract.

The grounds on which the appeal and motions are based are that in respect of all the land all the minerals other than gold and silver are reserved and in respect of a portion of the land, it is subject to certain rights under the North West Irrigation Act. It is pointed out that the reservation includes oil and it stated in an affidavit used in support of the application that the reserved minerals are of "very material value"; and there is no denial of this statement.

Furthermore the affidavits on the part of the applicants allege facts for the purpose of shewing that the plaintiff is acting in collusion with the defendant Hacket, one of the several purchasers who holds the security from the applicants upon their interest in the lands in question. In the view I take of the matter before us it is not necessary to investigate this affair. The order of Mr. Justice Walsh —for specific performance—contains no recital or declaration that the plaintiff has shewn a good title nor does it direct an inquiry as to title. And again I remark in passing that I think that the order was defective in this respect.

In the case of Halket v. Earl of Dudley, [1907] 1 Ch. 590, Parker, J., deals at length with the substantial question which is now before us. His opinion, which I accept, is this: A purchaser's right to repudiate the contract on the ground of want of title is an equitable right arising from want of mutuality and may be defence to an action for specific performance; but that in order to avail himself of that defence, he must repudiate the contract promptly after finding out that the vendor cannot make a god title or if he had not repudiated promptly after the lapse of a reasonable notice to the vendor to prove a good title; but that where repudiation is not set up as a defence and a judgment for specific performance has gone, the purchaser cannot repudiate without leave of the court; and that the purchasers proper course in the latter case is to move to be discharged from the contract, and that in each case the court will consider the circumstances and grant the relief or refuse it, as may appear to be equitable. The court in dealing with such an application should, in my opinion, in the case of trifling defects in title refuse to permit repudiation upon the vendor submitting to make compensation or to permit an abatement of the purchase money (see p. 596)."

In the present case there is a complete absence of title to the base minerals including oil and it appears that in the locality in which these lands lie the mineral rights, though improved, add materially to the value of the land. Their real value can be ascertained only by somewhat extensive and expensive operations—operations, in the event of an inquiry—in which the purchaser would be entitled to take part and thus would incur considerable expense. It therefore seems to me it is not a case of such a trifling defect of title as to make it fair that the vendor should be permitted to hold his contract subject to compensation or abatement of purchase-money to be ascertained on an inquiry.

Under the circumstances I think a fair order to make is that the purchasers be discharged from the contract and that the order of Mr. Justice Walsh be discharged unless the vendor makes a good title to the minerals as well as the surface to the satisfaction of a judge within three months reserving further directions to a judge.

The applicants and appellants should pay the costs of the proceedings before this Court and before Mr. Justice Ives.

The form of the order for specific performance, etc., leads me to make some observations upon the practice in that regard. In Shurman v. Buring, 7 W. L. R. 610, I declined to give an order for specific performance and at the same time a personal order for the payment of the balance of purchase money, and the same opinion was recently expressed by the Saskatchewan Court in Hargreaves v. Security Investment Co., 29 W. L. R. 317.

A more careful investigation of the late English practice and a consultation with some of my brother judges leads me to the conclusion that I was wrong.

In Seton on Judgments and Orders, 7th Ed., Volume 111, Chap. L., tit. "Specific Performance," Sec. 11 (11) "Title accepted, established or disproved," there are several forms indicating the practice. Form 3 where the title is accepted, (1) declares that the agreement ought to be specifically performed and orders accordingly; (2) orders certain accounts, etc.; (3) recites the acceptance of the title; and (4) orders "that upon the plaintiff's executing a proper conveyance of the said estate to the defendant at the expense of the defendant according to the said agreement, or to whom he shall appoint, such conveyance to be settled by a judge and delivering to the defendant upon oath all deeds and writings in their custody or in their power relating to the said estate . . . the defendants do pay to the plaintiffs the balance which shall be certified to remain due to them in respect of such purchase money and interest and costs . . . ."

Form 4 so far as it relates to payments is substantially the same as form 3.

Such an order, however, is obviously not one upon which execution can be issued; the delivery of the conveyance and the title deeds are undoubtedly to be in exchange contemperaneously for the purchase money; an absolute order for payments, that is, one upon which execution could be fixed would have to be obtained subsequently upon shewing execution of a proper conveyance and a readiness and willingness to deliver it to the title deeds upon payment. The foregoing forms were those used in Morgan v. Briscoe, 34 W. R., 1913, and Bell v. Denver, 54 L. T. 129; 34 W. R. 638. In the latter case, the plaintiff vendor executed the conveyance, an assignment, and tendered it with the title

deeds to the defendant purchaser who refused to pay the purchase money. A motion was made for leave to issue execution. The court (North, J.), said: "I think the best course will be for the plaintiff to deposit the execution assignment and the deeds in Court. . . . Upon the plaintiffs depositing in court the assignment of the deeds, I make an order which is not to be drawn up until the deeds have been deposited in court, that the defendant do pay to the plaintiff the amount certified to be due to him within four days after the service of the order."

In the former case, the defendant purchaser not having tendered a conveyance nor paid the purchase money, the plaintiff vendor on motion obtained an order that the plaintiff vendor be at liberty to prepare and execute a conveyance to the defendant purchaser as an escrow to be delivered to the defendant on payment of the purchase money within the time limited, the conveyance to be settled by a judge, and that the defendant do pay to the plaintiff at a time and place to be appointed by the judge when the said conveyance shall be so approved as aforesaid, the sum of, etc. . . . and that thereupon the plaintiff do deliver to the defendant the said conveyance of the said premises, duly executed by him, together with all deeds and writings in his custody or power relating to the said premises.

In Robinson v. Galland, 37 W. R. 396, it was held that this latter form of order was one upon which execution by way of fi. fa. could be issued. The court (Chitty, J.), saying: "It is a newer form of order adopted on purpose to prevent it being said by the defendant that the order is conditional. A further development of the practice is expressed by Form 5, which after adjudging specific performance, etc., directs the defendant purchaser to lodge in court the balance of the purchase money and then order that upon such lodgment being made, the plaintiff do execute to the defendants at their expense a conveyance of the said estate to be settled, etc., and deliver to the defendant all deeds and writings in his custody or power relating thereto. The note thereto says: 'This form of order awards the inconvenience and expense to the plaintiff of preparing and executing a conveyance, as in Morgan v. Suscoe, which the purchaser may be unable to take up.'"

Such an order as the foregoing could under the English Rules be enforced by sequestration attachment (English O.

47 R. 4), or equitable execution by way of a receiver, but under our own Rule 579 it can be enforced by fi. fa., the ordinary form being appropriately modified.

In view of the foregoing, I abandon my former opinion. I now think that in an action by a vendor against a purchaser, there is no reason why an order for specific performance and an order for the payment by the purchaser of the balance of the purchase money should not be embodied in the same order. The title of the plaintiff—a thing generally overlooked—should be (1) indicated and be stated by way of recital to have been admitted or proved; or (2) a reference as to title should be directed. In the former case the order for payment might quite properly be unconditional; in the latter conditional on a good title being shewn. Whether the payment should be directed to be made to the plaintiff or into court, should be made to depend upon the state of the title: to the plaintiff if his title consists of a certificate of title clear of incumbrance, otherwise the court. But in either case the order should not be made until the plaintiff has done what may be necessary to protect the defendant, which, I think, having in view our land registration system, should be the registration of the order itself or a separate declaratory order declaring the defendant's interest and the deposit in court of a transfer or other appropriate conveyance and such instrument of title as are or ought to be in his custody or power.

As to including also in the order an order for the sale or recission, there seems no reason why this cannot be done, but it seems to be inexpedient, because it concludes the plaintiff from selecting the alternative remedy in case of default and in neither case a subsequent application for an order absolute is necessary. In the case of a sale this is the settled practice. In the case of rescission it is certainly equally necessary for no registrar under the system of land titles could properly recognize that an order of rescission conditional on non-payment had become effective by reason of default.

SCOTT and SIMMONS, JJ., concurred.

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

GOODCHILD v. BETHEL ET AL.

Vendor and Purchaser—Open Contract for Sale of Land—Obligations of Vendor—Good Title—What Constitutes—Power to Compel Transfer—Encumbrances—Payment of Purchase-money Into Court to Discharge—Vendor Entitled to Reasonable Time to Get in Outstanding Interest.

A vendor, under an open contract for the sale of land, who is not in fact the registered owner, shews a good title if he is entitled to compel a transfer to him, even though his title is subject to encumbrances which exceed the purchase price, provided the encumbrancee is compellable to take his money by the time a good title is to be proved.

When the time arrives for completion of the contract by transfer by the vendor and payment of the purchase-money by the purchaser, the purchaser, in a proper case, will be ordered or permitted to pay his money into court for the purpose of discharging encumbrances against the land. If either party is not ready at the appointed time, a time may be fixed by a notice to the other party giving a reasonable time for completion and making time of the essence on non-compliance with which the party giving the notice may call the contract off.

If a good title is shewn and proved and the vendor though apparently entitled under an enforceable agreement to get in an outstanding interest is resisted in the enforcement of it, the vendor is entitled to a reasonable time within which to procure the enforcement of the contract.

An appeal from the judgment of WALSH, J., ordering specific performance of an agreement for the purchase of land, plaintiff being the vendor and defendant, Bethel, the purchaser.

O. M. Biggar, K.C., for plaintiff, respondent.

R. D. Tighe, for defendant Bethel, appellant.

BECK, J.:—The plaintiff was not the registered owner at the time of the making of the agreement. The registered owner was one Cook. The plaintiff obtained an agreement for sale from Cook dated the 4th July, 1911, for $20,000, payable as follows:—$4,000 down; $5,333.33 on the 4th July, 1912; $5,333 33 on the 4th July, 1913; $5,333.33 on the 4th July, 1914—with interest at 8 per cent. per annum. This agreement contained provisions accelerating the payment of the deferred payments in case of default, and for forfeiture of all interest in the land and in all moneys paid in case of default after a thirty days' notice.

The agreement from the plaintiff to the defendant Bethel is dated the 25th May, 1912. The price was $60,000 "on which the purchaser has paid the sum of $15,000 by way of deposit"; the balance being payable:—$15,000 on May 25th, 1913; $15,000 on May 25th, 1914; and $15,000 on May 25th, 1915. The agreement contains the following provision:—"The vendor hereby agrees that should he fail to make payment of the sums due by him in respect of the said lands the purchaser shall be entitled to pay the same and shall be entitled to credit under this agreement for all sums so paid." There is no express reference to the agreement under which the plaintiff's vendor held the land; but this clause makes it plain that the defendant Bethel was aware of the character of the plaintiff's title.

The plaintiff's statement of claim, in which he takes advantage of the acceleration clause, is in effect a claim—not for specific performance but—for a sale of the land for the purpose of realizing the plaintiff's lien for the unpaid balance of purchase money. The action was commenced on the 13th September, 1913. The plaintiff became the registered owner of the land on the 6th January, 1914, his vendor having given him a transfer and accepted as security for the balance of the plaintiff's purchase money a promissory note, secured by the deposit of the certificate of title in the hands of a third party.

The defence was delivered on the 24th December, 1913, Taking the defence as repudiating the agreement (which it does not do expressly though I suppose it does impliedly—and this interpretation is expressly admitted by plaintiff's counsel), the ground of repudiation is a "defect" in title of the plaintiff. A purchaser is undoubtedly entitled to repudiate his contract if at the time of repudiation the vendor has not in fact a good title.

The practice in this jurisdiction, where the Torrens System only is in force, of shewing a title by production of an abstract, differs greatly, as it must, from the practice in England.

I think that on an open contract for sale and purchase there is an implied term to the effect that the vendor is bound when the time for shewing title has come to produce on request of the purchaser a Registrar's abstract and general certificate and in case the Registrar's abstract does not shew a sufficient title also a written statement shewing how the apparent defects are met.

Owing to the simplicity of titles under our system this obligation is often waived altogether or a verbal explanation merely of the condition of the title is accepted. The obligation of course in either case remains of producing proper proof that the vendor has in fact a good title.

A good title is shewn if although the vendor is not in fact the registered owner he is entitled to compel a transfer to him. It is good even if subject to encumbrances even though exceeding the purchase price provided the encumbrances is compellable to take his money by the time a good title is to be proved. See Williams on Vendor and Purchaser, 2nd ed., pp. 164, et seq., and Fry on Specific Performance, 5th ed., sec. 1385.

When the time for completion of the contract by transfer by the vendor and payment of the purchase money by the purchaser arrives both must be ready to fulfil these mutual obligations subject I think to this that in a proper case the purchaser will be ordered or permitted to pay his money into court for the purpose of discharging encumbrances against the land. This, I think, is the settled practice of this court. If either is not ready at the time fixed or appointed a time may be fixed by a notice to the other fixing a reasonable time for completion and making time of the essence (Williams, pp. 579; 1035-6) on non-compliance with which the party giving the notice may call the contract off.

If good title is shewn and proved within the rules above stated and the vendor though apparently entitled under an enforceable agreement to get in an outstanding interest is resisted in the enforcement of it, the vendor is entitled to a reasonable time within which to procure the enforcement of the contract. What is a reasonable time in such a case and where a notice making time of the essence whether the time fixed is reasonable are questions which must be decided according to the circumstances of each case. See Fry, sec. 1368, et seq.

It is admitted that the plaintiff was not the registered owner till the 6th January, 1914; that up to that date Cook was the registered owner; that up to that date the plaintiff was in default in respect of his agreement with Cook; that there was no encumbrance or cloud on the title.

The learned judge in effect finds on the evidence—as he could scarcely avoid finding—that before the defendants attempted repudiation of the agreement the plaintiff and Cook

had come to an agreement that on payment of a certain sum on account of the arrears under the Cook agreement the plaintiff should have time for the payment of the balance and that this arrangement was carried out according to its terms resulting in the plaintiff becoming the registered owner on the 6th January, 1914. It is contended that this agreement was not binding on Cook because there was no consideration for it. One of its terms was the payment down of $1,000 and this payment was made, so that the agreement was a concluded agreement not a mere arrangement which one or other party did not take advantage of. I think that although a greater sum was in fact at the time in arrear there was a consideration for the agreement in the advantage of getting an immediate payment of part of those arrears, no part of which probably would otherwise have been paid. I think this is at all events so under the provision of the Judicature Act, which says: "Part performance of an obligation either before or after a breach thereof when expressly accepted by the creditor as satisfaction or rendered in pursuance of an agreement for that purpose though without any new consideration shall be held to extinguish the obligation."

The plaintiff, therefore, in my opinion, was at the time of the attempted repudiation by the defendant in a position to shew a good title, that is, a title in such a condition at that time that is appeared that when he was bound to prove a good title he could do so.

No objection is taken to the judgment being for specific performance in the usual form rather than a direct order for sale to realize the vendor's lien.

For the reasons given I would dismiss the appeal with costs.

STUART, J.:—I think this appeal should be dismissed with costs. The defendant's default arose on May 25th, 1913, when he failed to make the stipulated payment of $15,000 and interest. The plaintiff did not become in default to his vendor until 4th July, 1913, when he failed to make a payment of $5,333.33 and interest. On 3rd September, 1913, the plaintiff issued his writ and on 24th December, 1913, the defendant filed a defence to an action, caused by his default of May 25th, 1913, wherein he raises as a defence a default of the plaintiff which occurred only on

July 4th, 1913. And yet the agreement between the plaintiff and the defendant contains this clause:

"The vendor hereby agrees that should he fail to make payment of the sums due by him in respect of the said lands the purchaser shall be entitled to pay the same and shall be entitled to credit under this agreement for all sums so paid."

This shews that the defendant knew of the existence of the plaintiff's agreement for purchase from Cook, the registered owner, and I think we ought, in the circumstances to assume either that he was acquainted with its terms or could easily have ascertained them if he so desired. It is a case in which the defendant is seeking to get an advantage from his own default and from the plaintiff's complaisance. If the plaintiff had sued promptly on the 26th of May, no such defence as is now suggested could possibly have been raised by the defendant, because he would at once have been met with the objection that he was at liberty to make the payments which was to fall due to Cook on July 4th, and to take credit for it upon his payment to the plaintiff. As the matter stands, the defendant is seeking to get an advantage which could have come to him only by his own delay and default. Inasmuch as there is now in fact no difficulty about the title, I do not think the defendant should be allowed to take advantage of a possible difficulty which did not exist when he was first in default, which he could himself without costs have easily prevented from ever arising by simply paying part of his debt to the plaintiff in a manner permitted to him by the agreement and which has now in any case entirely disappeared.

This view of the cause rests entirely upon the defendant's knowledge of the prior agreement and the stipulation in regard to it. The position might be otherwise, if he, on December 24th first became aware, not merely by the default of July 4th, but of the nature of the plaintiff's title. In that case, however, he would no doubt be met by the special agreement between Cook and the plaintiff, by which the plaintiff's default was, to say the least, waived by Cook.

SCOTT and SIMMONS, JJ., concurred with BECK, J.

Appeal dismissed.

THE

Western Law Reporter

VOL. XXX. TORONTO, FEB. 1, 1915. No. 6

SASKATCHEWAN.

OUSELEY, DIST.CT.J. DECEMBER 24TH, 1914.

DISTRICT COURT OF MOOSE JAW.

REX EX REL. JERRAM v. GREIG.

Bail—Application under Sec. 698 of Code—Order Granting Bail—Jurisdiction of Judge Making Order to Hear Application to Amend—Prisoner Released and Re-arrested—Application de Novo—Justification by Bondsmen—Principles Governing the Granting of Bail—Sufficiency of Sureties—By Whom Determined—Practice—No Jail in District—Prisoner Committed to Provincial Jail—Jurisdiction over Prisoner under Sec. 698.

A judge who makes an order granting bail has no jurisdiction to amend or vary the said order.

A judge who makes an order granting bail under which the prisoner is released and re-arrested has jurisdiction to entertain an application *de novo* for an order for bail.

Upon an application for an order for bail under sec. 698 of the Code, it is for the court, and the court alone, to decide the question of the sufficiency of the sureties where the counsel for the Crown and the counsel for the prisoner cannot agree.

The bondsmen of the person in custody must justify.

Where there is no jail within the district a prisoner is committed for trial and the prisoner is confined in the common jail for the whole province, the judge by whose order the prisoner was confined has such constructive possession of the prisoner as to give him jurisdiction to grant bail under sec. 698 of the Code, giving jurisdiction to grant bail to any judge of a superior or county court having jurisdiction in the district or county within the limits of which the accused is confined.

An application for bail.

C. E. Armstrong, for the Crown.

A. W. Routledge, for the prisoner.

OUSELEY, DIST.CT.J.:—This is an application for bail. On the 16th day of December the prisoner was committed for trial by W. H. B. Spotton, Esq., acting Police Magistrate for the city of Moose Jaw, for an offence against sec. 396 of the Criminal Code for having sold a C. P. R. contract covering lots 33 and 34 of the plan of the town of Assiniboia, the property of one C. F. Jerram. On the same day that he was committed the accused appeared before me and was arraigned for election, and elected to be tried by a judge and jury and was remanded by me to jail. Counsel for the prisoner obtained an order for bail. This order was drawn up by himself and while not actually consenting to the order, the Crown Prosecutor, who was present at the time of the application, suggested certain alterations in the order and made no objection whatever to any of its terms.

The order for bail provides that the prisoner shall enter into a recognizance himself in the sum of $2,000 and two sureties in the sum of $1,000 each, "who shall justify acceptably to the agent of the Attorney-General." These words were written in in ink by counsel for the prisoner. After the order for bail was made the prisoner was taken to Regina and subsequently was released, bail having been furnished. He was, however, re-arrested on the same warrant, the grounds being that the warrant of deliverance of the prisoner was signed by one justice only and not by two justices.

Upon his re-arrest counsel for the prisoner moved before me to strike out from the order for bail the following words, "who shall justify acceptably to the agent of the Attorney-General." On the return of the motion counsel for the Crown objected that I had no jurisdiction to amend my order unless with the consent of the Crown, which consent the Crown refused to give. In this contention counsel for the Crown is quite right that I have no power to amend my order. Apart from the fact that the objectionable words in the order for bail were interlined or written in by counsel for the prisoner himself, it seems to me that, unless some authority can be shewn to me whereby I could vary the order on application, I have no jurisdiction, once an order for bail has been given, to amend or vary it. I am of opinion, however, that since the order for bail was made and it has been acted upon, the prisoner released from custody but re-arrested, that counsel for the prisoner has the right to apply to me de novo for an order for bail.

I may say here that if I had jurisdiction to amend or vary the order made I would have no hesitation whatever in striking out of the order the words complained of. These words, it seems to me, practically delegate to the Crown the duty of the court to stand between the Crown and the prisoner. I think it needs only a statement of the proposition to shew how unfair and unjust it would be for prisoners confined in jail to only obtain their liberty on furnishing bail which would be acceptable to the party who is opposing their release. I was informed that the practice in Regina was that on applications for bail the matter of the sufficiency of bail was delegated or left to the agent of the Attorney-General. I cannot conceive that this is so and I am quite sure that what is done there is the same as the practice that I have adopted here, namely, that on the making of an order for bail the judge informs counsel for the Crown and for the prisoner that if they cannot agree as to the sureties, to apply to the court and the court will decide the matter of the sufficiency of the sureties.

Mr. Routledge, for the prisoner, contended that the question of the sufficiency of bail was a matter for the magistrate alone and not for the court. Mr. Armstrong, the counsel for the Crown, contended that if the matter of the sufficiency of bail was not for the agent of the Attorney-General, at least it was a matter for the court alone and not for the magistrate who might take the formal bail. I cannot accede to Mr. Routledge's proposition that the matter of the sufficiency of bail is for the magistrate, as I am clearly of opinion that, under the section of the Code under which the application is made, that the duties of the magistrate under that section are purely ministerial and that when the section directs "That the accused be admitted to bail on entering into a recognizance with sufficient sureties before two justices in such amount as the judge directs and thereupon the justices shall issue a warrant of deliverance as hereinafter provided," that the justices have no judicial duties to perform, whatever, and are merely acting in a ministerial capacity to carry out the order of the court.

This, of course, does not apply to cases where the justices under the Code have the power to grant bail, because in granting bail in those cases they are acting judicially. I do not see how it can be contended that section 698 of the Code under which the order for bail was applied for in this

matter that the justices are the parties who pass upon the sufficiency of the sureties offered. Section 698 reads as follows:

"In case of an offence other than treason or an offence punishable with death or an offence under part 4 of this Act where the accused has been finally committed as herein provided any judge of any superior or county court having jurisdiction in the district or county within the limits of which the accused is confined may, in his discretion, on application made to him for that purpose, order the accused to be admitted to bail on entering into a recognizance with sufficient sureties before two justices in such amount as the judge directs, and thereupon the judges shall issue a warrant of deliverance as hereinafter provided and shall attach thereto the order of the judge directing the admitting of the accused to bail."

The accused having been committed for trial the justices have no power to grant bail. The matter of the sufficiency of the sureties is a matter for the judge who grants the bail.

Upon an application for bail it has been laid down that the proper test as to whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. See Re Robinson, 23 L. J. Q. B. 286; R. v. Scaife, 10 L. J. M. C. 144. Archbold's Criminal Pleadings, 24th edition, p. 112, says the test should be applied by reference to the following considerations:—

"1. The nature of the accusation. R. v. Baronet, 1 E. & B. 1; R. v. Butler, 14 Cox's Criminal Cases, 530.

"2. The nature of the evidence in support of the accusation (Re Robinson, supra). R. v. McCormack, 17 Ir. C. L. R. 411.

"3. The severity of the punishment which conviction will entail (Re Robinson, supra). The character or behaviour of the accused is said to be irrelevant.

"4. Whether the sureties are independent or indemnified by the accused. R. v. Butler, 8 L. R. Irish 39, 14 Cox's C. C. 530; Herman v. Jeuchner, 15 Q. B. D. 561; R. v. Porter, [1910] 1 K. B. 369."

Archbold, at p. 112, has the following: "The bail must be of ability sufficient to answer for the sum in which they are bound. 2 Hawke, ch. 15, sec. 4. They are usually householders but it is for the magistrate or judge to act upon his discretion as to the sufficiency of bail; R. v. Saun-

ders, 2 Cox 249; 1 Burns, J., Bail, 373, 30th edition; 1 Chitty Criminal L., 99; and the proposed bail may be examined on oath as to his means though in criminal cases justification of bail is said not to be essential. R. v. Hall, 2 W. Bl. 1110; 1 Chitty Criminal Law, 100; but see Short & Mellor's Criminal Practice, second edition, 287." The practice in Saskatchewan has been almost universally to require the sureties to justify and I adopt therefore the practice as laid down by Short & Mellor's Criminal Practice, and hold that although it may be in the discretion of the judge or magistrate, unless the bail is personally known to the judge or magistrate granting the order, that the bondsmen of the person in custody should justify. It is further laid down that the court or magistrate may at discretion order that reasonable notice may be given to the prosecutor and the police to enable him or them to enquire or to object as to the sufficiency of the bail.

It seems clear to me, in view of this statement of the law that upon an application for bail to a judge or magistrate that the practice is for the accused to submit the names of his sureties and their residence and occupation and for the judge or magistrate in his discretion to give leave to the prosecutor for the Crown to make inquiries as to whether the proposed sureties have sufficient means to satisfy the amount in which they are to be bound and that after inquiries have been made and the parties heard the judge or magistrate thereupon decides as to whether or not the bondsmen offered by the prisoner are sufficient.

It will be noticed that section 698 gives jurisdiction to "any judge of any superior or county court having jurisdiction in the district or county within the limits of which the accused is confined" to grant bail. Mr. Armstrong objected that as the prisoner was confined in the common jail at Regina that I had no jurisdiction over his person as my district did not include the district or county within the limits of which the accused was confined. I am of opinion, however, that I have jurisdiction over the person of the accused. Where there is a common jail for the whole province and the prisoner is confined in such common jail, I think that the judge granting bail has such constructive possession as will give him jurisdiction to make the order. Where, owing to the lack of a jail in the district in which a prisoner has been committed for trial, there is no place where prisoners who

are committed for safe keeping to await their trial can be confined and prisoners are sent to Regina for safe keeping. I am of opinion that the magistrates or judges of the different districts by whose order the prisoner is confined in the common jail at Regina have such constructive possession of the prisoners as would give them jurisdiction over such prisoners and it is to be assumed that the confinement at Regina is a confinement within the district of the magistrate or judge granting the order for bail.

By section 3 of chapter 67 of the Revised Statutes of Saskatchewan, being an Act Respecting Jails and Prisons, it is enacted that "until otherwise provided by competent authority the buildings and premises now in use or hitherto claimed to be common jails in Saskatchewan shall continue to be the common jails of the Province." I think I can give no other reading of the words "Common Jails in Saskatchewan," than meaning jails common to all the different districts in the province and that the prisoner here being confined in the common jail at Regina is within the spirit of section 698 of the Code confined in the common jail for the Judicial District of Moose Jaw, and within the limits of this Judicial District.

SASKATCHEWAN.

WOOD, DIST.CT.J. NOVEMBER 10TH, 1914.

DISTRICT COURT OF WEYBURN.

JOHNSON v. COLE.

Animals — Lien Note on Mare — Natural Increase — Purchaser a Dealer in Live Stock—Bona Fide Mortgagee in Ordinary Course of Business—Ownership—Head-note in Case Threshing Machine Co. v. Gouley Corrected.

A lien note upon a mare does not include the increase beyond the time which it is necessary for the colt to follow the mare for nurture in the absence of express provision.

A mortgagee of a colt, the natural increase of a mare, for value and without notice, who acquires his mortgage from a dealer in live stock in the ordinary course of business, obtains a good title to the colt against the vendor of the mare who held a lien note thereon from the mortgagor.

Case Threshing Machine Co. v. *Gouley*, 29 W. L. R. 811, followed.

N.B.—The word 'or' in the first line of the head-note of the latter case should read 'of' and the words 'until they no longer need the nurture of their mother; in order that the mortgage cover the increase beyond this time there must be express provision,' should be added to the first paragraph of the said head-note.

H. N. Morphy, for plaintiff.

W. E. Knowles, for defendant.

WOOD, DIST.CT.J.:—On March 16th, 1912, one William Sangster purchased from the plaintiff a mare, and gave the plaintiff a lien note to secure the purchase price of $340. The lien note is expressed to be given for "one white-faced mare, 10 years, in foal." It was in the usual form, and there was no expressed provision that it would cover the natural increase of the mare.

The lien note having not been paid, the plaintiff repossessed the mare. It does not appear when the mare was taken by the plaintiff, but the lien note was payable on November 1st, 1912, so it would be some time subsequent to this date. The mare had a mare colt in May, 1912. The plaintiff's own evidence is that when he took the mare, he told Sangster that he might keep the colt, if he would pay the note, upon which he agreed to credit $200 as the value of the mare which he had repossessed. It was strongly urged that this permission to keep the colt on the terms mentioned operated as a waiver of any rights the plaintiff may have had to the colt under the lien note, at least as against subsequent purchasers or mortgagees. I think there is a great deal in this contention.

On March 18th, 1913, Sangster mortgaged to the defendant a very considerable number of horses and cattle, and among them the colt in question. About February 1st, 1914, the plaintiff took the colt, claiming it under his lien note. Shortly after this (in fact in the same month), when the defendant became aware of the plaintiff's action, he went to the latter's place, and seized the colt under his mortgage. The plaintiff then brought this action to recover the colt or its value, claiming it as being his property under the lien note.

I have already pointed out that I think there is a great deal in the contention that the plaintiff waived any rights he may have had to this colt by not seizing it at the time he seized the mare, and by his agreement with Sangster that

he might keep it, if he would pay the note. It seems to me very undesirable that seizures under lien notes should be made piecemeal. Apart from this, the question arises as to the ownership of the colt as a foal of the mare included in the lien note. In Case Threshing Machine Company v. Gouley, 29 W. L. R.811, I have recently held that a mortgage of a mare would include her foal, in any event, until it was no longer nurtured by the mother, and this apart from any express provision to that effect. In that case, I further expressed the opinion that, where the mortgage of mare expressly included the natural increase, such increase might come under the mortgage, even if the foals had left their mothers, so long as they could certainly be identified as the offspring of the mortgaged mares. I cannot see any distinction in this respect between a chattel mortgage and a lien note, because the question is really one entirely of ownership. I am not prepared to go that far, however, where there is no express provision of the kind. In Barron & O'Brien, Mortgages & Bills of Sale, 1914 Edition, page 35, the opinion is expressed that it is "doubtful if a mortgage of a cow would cover her calf beyond the time during which it is necessary for the calf to follow the cow for nurture, and there seems to be a limit in point of time where a mortgage of animals will cover the increase, unless the mortgage covers such increase by expressed terms."

I am in entire agreement with this doubt, and am prepared to hold that whether or not a mortgage or a lien note (as in this case) extends to and includes the increase of mortgaged mares beyond the time during which it is necessary for the colt to follow the mare for nurture, depends upon whether or not there is an express provision to this effect in the instrument. In the case at bar, it is not disputed that the colt in question had left its mother long before the plaintiff seized it under the lien note on the mother, and I think it is equally certain that the colt had left its mother at the time when Sangster mortgaged it to the defendant. In the lien note, there was no provision that the natural increase of the mare was intended to be included in the lien: while, therefore, I would be prepared to hold that the lien note did include the colt while it was following its mother for nurture, I also hold that, in the absence of express provision, the colt would not come under the operation of the lien note after it had left its mother, and that

the defendant would, therefore, be entitled to it under his mortgage as against the plaintiff.

There is another ground not raised at the trial, upon which I think the defendant would be entitled to succeed. Sangster seems to have been the owner of a very considerable number of horses and other animals, and could, therefore, be considered as being engaged in the livestock business. Under all the circumstances of this case, I think that Sangster gave the mortgage on this colt in the ordinary course of his business, and that the defendant was a bona fide mortgagee for value and without notice of the plaintiff's lien note, and was, therefore, entitled to the colt on this ground as against the plaintiff.

There will be judgment for the defendant, dismissing plaintiff's action with costs, and declaring as against the plaintiff that the defendant is entitled to the colt in question under his mortgage.

SASKATCHEWAN.

WOOD, DIST.CT.J. NOVEMBER 10TH, 1914.

DISTRICT COURT OF WEYBURN.

INTERNATIONAL HARVESTER CO. OF AMERICA v. LEESON.

Lien Notes—Action on—Non-suit—Subsequent Action—Different Plaintiff—Res Judicata — Evidence — Burden of Proof—Non-Delivery and Payment—Warranty as to Fitness of Plow for Particular Purpose.

The execution of a lien note implies a complete sale transaction at or before its execution unless the contrary appears from the instrument. Therefore, in an action on a lien note given as security for the purchase price of goods, non-delivery and payment are defences, and, as such, must be pleaded and proved by the defendant.

In an action brought by the International Harvester Company of Canada on certain lien notes made in favour of the International Harvester Company of America, which was shewn to be a separate company, the plaintiff was non-suited on the ground that there was no assignment pleaded, and no attempt to prove one, to the former company. *Held*, that the defence of *res judicata* was not good in a subsequent action brought upon the same notes against the same defendant by the International Harvester Company of America, on the ground that the two actions were not between the same parties.

Action upon lien notes given by the defendant to the plaintiff company to secure the purchase price of farm implements.

J. S. Rankin, for the plaintiff.

H. M. Allan, for the defendant.

WOOD, DIST.CT.J.:—The plaintiff proved the lien notes and rested its case, after putting in certain portions of the defendant's examination, for discovery, in which the defendant admitted that he purchased the machinery referred to in the lien notes from the plaintiff company and gave the notes in question.

Defendant's counsel applied for a non-suit on the following grounds:—

(1) That consideration for the lien notes had not been proven, that is, the actual delivery of the implements referred to therein; and

(2) That non-payment had not been proven.

I reserved the question of a non-suit, and proceeded with the trial.

Even if it were necessary for the plaintiff to prove the delivery of the implements to secure the purchase-price for which the lien notes were given, I am of the opinion that such delivery is sufficiently proved by the evidence of the defendant, who admits having purchased them. In any case, in my view, actual delivery of the goods need not be proved where the action is on a lien note given as security for the purchase price of the goods, any more than such delivery would require to be proved if the purchase price were secured by a promissory note. If the action were for goods sold and delivered, it would be a different matter, because delivery would be a necessary part of the completed sale. Unless there is something in the instrument to the contrary, I am of the opinion that the execution of the lien note implies a complete sale transaction at or before its execution. In that case, non-delivery would be a matter of defence, like fraud or any other ground upon which a written agreement might be avoided. I am, therefore, of the opinion that non-payment is not part of the plaintiff's case, but that payment is a matter of defence to be pleaded and proved by the defendant. Rules of Court 155 (English rule 211); Phipson on Evidence, 5th ed., p. 24, under the heading "Rebuttable Presumptions."

Among the defences raised by the defendant was that of res judicata. This plea was based on a judgment in a former action against this defendant in respect to the same lien notes which are in question here in which the International Harvester Company of Canada was the plaintiff. In that action, I non-suited the plaintiff company on the ground that it had no right of action on the lien notes sued on, they being made in favour of the International Harvester Company of America. In that action, no assignment to the International Harvester Company of Canada, which was shewn to be a separate company, was pleaded, and no attempt was made to prove assignment. I am of the opinion that I cannot give effect to that defence. In order to do so, I would, in my opinion, be obliged to find, not only that the judgment was in respect to the same subject matter, but that it had been decided between the same parties. In 13 Halsbury's Laws of England, at p. 332, paragraph 465, the following statement of the law is made: "In order that a defence of res judicata may succeed, it is necessary to shew not only that the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. The plea of res judicata must shew either an actual merger or that the same point has been actually decided between the same parties."

The International Harvester Company of Canada and the plaintiff company are two separate and distinct corporate bodies. The former may and possibly has largely taken over the Canadian business of the plaintiff company, but if that is so, there is no definite evidence before me to that effect, while there is evidence that business is still carried on under the name of the plaintiff company.

In 13 Halsbury's Laws of England, at p. 343, sec. 478, the law of estoppel by judgment is further set out: "A judgment inter partes raises an estoppel only against the parties to the proceedings in which it is given and their privities, i.e., those claiming or deriving title under them. As against all other persons, it is res inter alios acta, and with certain exceptions, though conclusive of the fact that the judgment was obtained and of all its terms, is not even admissible evidence of the facts established by it."

I think that these two references effectually dispose of the defence of estoppel. I, therefore, hold that the plaintiff company is not estopped from suing on these lien notes by my former judgment dismissing the action of the International Harvester Company of Canada in respect of the same lien notes.

The only remaining defence is that the defendant made known the purpose for which he required the plow (one of the implements purchased); that the defendant relied solely upon the representations of the plaintiff company's agent that it was fit for the purpose for which he required it, and that it was not fit for the said purpose.

It seems to me that a plow cannot be otherwise than fit for the purpose for which it is intended, unless it is useless owing to defective material or construction, and that no farmer who knew his business could be very seriously misled by any misrepresentation regarding it. Warranties regarding its capacity could scarcely be on the same footing as those made respecting engines or other complicated farming machinery. I am satisfied, however, that if the defendant was unable to raise the shears at times sufficiently out of the ground, as he states, it was not due to any defect in the construction of the plow, but to the inexperience of the defendant in the use of this particular kind of plow. He says he had never used any of this make before, and there was other evidence that there was really nothing wrong with it. Defendant took it back about a month after he had purchased it, and, after successfully plowing a considerable quantity of ground, placed it in the agent's yard at Forward. I can find no justification for his having done so, and there is nothing to shew that the plaintiff company at any time acquiesced in its return. I dare say that the defendant is at liberty to take the plow away at any time he desires. Plaintiff company, in my view, never in any way exercised its rights of repossessing the plow, nor was anything done inconsistent with the defendant's right to it. Indeed, on December 27th, 1911, months after the defendant placed it in the plaintiff company's yard at Forward, he wrote the agent a letter which was put in at the trial, in which he merely complained as to the due dates of one of the lien notes. In that letter, he says: "Your agent at Forward deceived me when the notes were drawn up. There was to be one for the fall in 1911, and one for 1912. When

I had the money to pay for the first note, I found out they were both due at the same time, so I used the money myself for clothing. I am not threshed yet, and very few of my neighbours, but I hope to give you the money by March, if nothing happens. If I cannot get threshed by then, I will get it from the bank for you." There is no word here to the effect that the plow would not work satisfactorily, or that the defendant had been misled by any misrepresentations as to the work the plow would do, or that the defendant refused to accept the plow, and so repudiated the agreement. I cannot conclude, therefore, that the defendant can avoid his contract on this ground.

There will, therefore, be judgment for the plaintiff company for the amount of its claim and costs.

MANITOBA.

METCALFE, J. DECEMBER 11TH, 1914.

CHAMBERS.

STEPHENSON v. COWAN.

Municipal Corporations—Local Option By-law—Injunction to Prevent Submission to Electors—Right of Individual Ratepayer to—Matter Affecting Public Generally—Special Damage—Insincerity of Motion—Practice—Attorney-General Not a Necessary Party—Defective Affidavit of Execution of Petition.

The Attorney-General is not a necessary party upon a motion for an interim injunction brought by a ratepayer and made on his own behalf and on behalf of all the other ratepayers to prevent the Council from submitting a local option by-law to the electors.

Skrimpton v. *Winnipeg*, 13 M. R. 219; *Davis* v. *Winnipeg*, 24 M. R. 480: referred to.

If the property or funds of a municipal corporation be illegally or wrongfully interfered with, or its powers be misused, and the officers of the corporation are parties to the wrong or will not discharge their duty, any inhabitant, and particularly a taxable inhabitant, has a right to take proceedings on behalf of himself and others similarly situated to prevent or avoid the illegal or wrongful acts.

An interim injunction will not be granted to an individual ratepayer preventing a council from submitting a local option by-law where the said ratepayer suffers no special damage and the court is of the opinion that the real object of the motion is to prevent the electors from voting upon the by-law.

An application by a ratepayer of the Municipality of Louise for an interim injunction to prevent the Council of the said municipality from submitting a local option by-law to the electors.

F. M. Burbridge, for plaintiff.

Hudson and Swift, for defendant.

METCALFE, J.:—The plaintiff, who is a farmer, is an elector and ratepayer residing in the Municipality of Louise. The Council, having received a petition, are about to submit a local option by-law to the electors. The plaintiff, on his own behalf and on behalf of all the other ratepayers (excepting the defendant councillors) moves for an interim injunction. The ground relied on is that the affidavit of execution of the petition does not comply with the requirements of the statute.

The objections are similar to those urged in Brock v. Robson and Rural Municipality of Sifton, 29 W. L. R. 897. Were the circumstances similar, I should follow that case.

The plaintiff swears that he is the owner of the east half of section 5-3-11, west of the first principal meridian, that the value of his lands has been greatly depreciated by reason of the first and second readings of the proposed by-law, and that, if the defendants proceed to submit the by-law to the people, the value of his lands will be further greatly depreciated. He says that he estimates such depreciation to be 25 per cent. of the land value and that unless the defendants are restrained, he will suffer irreparable loss and damage.

He further states that, unless the defendants are restrained as aforesaid, they will spend the money of the defendant corporation in printing ballots, publishing advertisements and for other matters and things connected with the submission of the said proposed by-law.

Stephenson is a farmer and is not engaged in any other business than that of farming; the lands mentioned in the affidavit of Stephenson are used solely for the purpose of farming, and there is no prospect of their being used for any other purpose.

This is a matter which affects the public generally. The plaintiff has shewn no special damage. In view of Shrimpton v. Winnipeg, 13 M. R. 219, followed in Davis v. Winnipeg, 24 M. R. 480, I can hardly hold that the Attorney-General should be a party. In England, it is the uniform

practice that the Attorney-General should be a party to such proceedings, but in Ontario and in the United States, the opposite rule prevails.

In Shrimpton v. Winnipeg, Mr. Justice Killam says: "The question of the right of a ratepayer to an injunction to prevent the conclusion of such an agreement has not been as carefully or fully argued on either side as I should have desired. . . . I feel that, under the circumstances, I, too, may well be excused from giving to the question an exhaustive consideration."

He justifies his conclusion upon the reasoning advanced in paragraph 915 (now 1580) of Dillon's Municipal Corporations, as follows:—

"1580. The doctrine of the preceding section is also supported by an analogy supplied by a settled rule of equity applicable to private corporations. In these, the ultimate cestuis que trust are the stockholders. In municipal corporations ,the cestuis que trust are in a substantial sense the inhabitants embraced within their limits. In each case, the corporation, or its governing body, is a trustee. If the governing body of a private corporation is acting ultra vires or fraudulently, the corporation is ordinarily the proper party to prevent or redress the wrong by appropriate action or suit in the name of the corporation. But, if the directors will not bring such an action, our jurisprudence is not so defective as to leave creditors or shareholders remediless, and either creditors or shareholders may institute the necessary suits to protect their respective rights, making the corporation and the directors defendants. This is a necessary and wholesome doctrine. Why should a different rule apply to a municipal corporation? If the property or funds of such a corporation be illegally or wrongfully interfered with, or its powers be misused, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant, and particularly any taxable inhabitant who will be injuriously affected, be allowed to maintain in behalf of all similarly situated a class suit to prevent or avoid the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist, they are liable to be plundered, and the taxpayers and property-

owners on whom the loss will eventually fall are without effectual remedy."

The author further states:—

"Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate power. The courts may be safely trusted to prevent the abuse of their process in such cases."

This rule, however, does not obtain in England. There the distinction is drawn between the rights of a shareholder and a ratepayer. The American rule having already been applied in this court, I must also apply it. I do not think, however, that in every case, no matter how trivial, the plaintiff may as of right demand. I do not take that to be the meaning of the extract from Dillon.

There is no licensed hotel in the municipality. If such state of things continues, I fail to see how the plaintiff's land will depreciate in value by reason thereof. In any event, I am not impressed with the argument that local option injures the value of farm lands.

I do not believe that the real complaint is because of the expenditure of money for the printing of ballots and the publishing of advertisements. I believe the real object is to prevent the voting. The case was argued before me on the 7th instant, the plaintiff asking leave to file a further written argument, which I received on the 9th instant. The voting takes place in a few days. It is not shewn that the municipality is expending any considerable sum. I believe the expenditure will be trivial and the greater part, if not all, is no doubt already incurred.

I am not impressed with the sincerity of the motion. I think that, under the special circumstances of this case, I should not entertain the application.

The motion is, therefore, dismissed with costs.

MANITOBA.

METCALFE, J. DECEMBER 8TH, 1914.

CHAMBERS.

RILEY v. WINNIPEG.

Practice—Demand for Particulars—Action Based on Breach of Contract.

Plaintiff alleged in his statement of claim that he entered into a contract to load gravel for ballasting defendant's tramway by which defendant was to supply the cars upon which the gravel was to be loaded. Plaintiff also alleged that, after having loaded a certain quantity of the gravel defendant notified him not to proceed with the work, refused to furnish cars, and removed plaintiff's plant from said work. The action was based on breach of contract.

***Held*, that plaintiff must satisfy defendant's demand for particulars by furnishing the best particulars he could give of the manner in which, the time when, and the place where defendant notified plaintiff not to proceed, and the manner in which, the time and place where, defendant refused to furnish cars.**

Cousens v. *C. N. R.*, 18 M. R. 321, followed.

An appeal from the order of the Referee dismissing an application by the defendant to compel plaintiff to deliver particulars of the allegations in his statement of claim.

Preudhomme, for defendant.

Symington, for plaintiff.

METCALFE, J.:—The plaintiff alleges that he entered into a contract to load gravel for ballasting the city's tramway between Lac du Bonnet and Point du Bois, for which he was to be paid by the city the sum of 22 cents per cubic yard. He further alleges that the corporation was to supply the cars upon which the gravel was to be loaded. Paragraph 4 of the statement of claim is as follows:—

"In pursuance of said contract the plaintiff proceeded to have the said work done, let sub-contracts therefor at the rate of 10 cents per cubic yard and had loaded 1,643 yards of gravel in accordance with the terms thereof when the defendant notified the plaintiff not to proceed with the work, refused to furnish cars and removed the plaintiff's plant from the said work."

The defendant demanded particulars, as follows:—

(a) The manner in which, the time when and the place where the defendant notified the plaintiff not to proceed with the work mentioned in paragraph 2 of the statement of claim;

(b) The manner in which, the time when and the place where the defendant refused to furnish cars;

(c) And the manner in which, and the time when the defendant removed the plaintiff's plant from the said work, all of which is alleged in paragraph 4 of the statement of claim.

The plaintiff, not having furnished particulars, the defendant moved for particulars and filed the affidavit of Mr. Glassco, the general manager of the light and power department of the city, in which, amongst other things, he says as follows:—

"In view of the variety of circumstances relating to the alleged contract and the work to have been done thereunder, it will be impossible for the defendant to prepare its defence herein, and to proceed with the trial in this action without being furnished with particulars as contained in the demand made by the defendant as aforesaid."

The Referee dismissed the application. The matter now comes before me by way of appeal from the order of the Referee.

The plaintiff's action is based upon the breach of the contract as alleged in paragraph 4. I think it is reasonable that the plaintiff should give some particulars as to the time and manner of notification not to proceed with the work and the refusal to furnish cars. Such notification and refusal may have been either in writing or verbal. The defendant's manager has made an affidavit that particulars are required. The plaintiff has not given any particulars nor explained why such should not be given.

I think under the circumstances I should follow the rule laid down in Cousens v. C. N. R., 18 M. R. 321.

I would therefore vary the order of the Referee and direct that the plaintiff do furnish the best particulars he can give of the manner in which, the time when, and the place where the defendant notified the plaintiff not to proceed and the manner in which, the time, and place where the defendant refused to furnish cars.

The plaintiff can examine the defendant's officers and compel production by them and thus secure further informa-

tion as to the facts he must establish if he is to succeed. The defendant is to have ten days within which to plead after delivery of the particulars and the plaintiff is to be at liberty to supplement his particulars not later than ten days before the trial of the action. The costs of this appeal and of the order appealed from to be costs in the cause to the defendant.

Appeal allowed.

MANITOBA.

MATHERS, C.J.K.B. NOVEMBER 9TH, 1914.

TRIAL.

KILGOUR v. ZASLAVSKY.

KILGOUR v. ZASLAVSKY AND ROSENFELD.

Fraudulent Conveyance—Voluntary Agreement by Husband to Convey Property to Wife at Future Time—Subsequent Conveyances Made When Husband Insolvent — Transactions Between Relatives—Suspicious Circumstances—Onus of Proof of Bona Fides—Corroboration—Parties—Rule 204 — Fraudulent Preference — Conveyance to Creditor of Insolvent of Latter's Property by Nominal Owner—Assignment Act, Secs. 39 and 40.

In transactions between relatives having the effect of defeating the claims of creditors, if the circumstances are suspicious, the onus is shifted to the purchaser of establishing judicially the *bona fides* of the transaction, and for this purpose the uncorroborated evidence of the parties to the transaction is in general not sufficient.

A voluntary agreement between a husband and a wife whereby the former agrees to transfer his property to the latter at a future time, cannot be relied upon to support, as against the creditors of the husband, a subsequent conveyance of the property at a time when he is insolvent.

Harris v. *Rankin*, 4 M. R. 115, applied.

Where a husband voluntarily transfers property to his wife for her benefit and the benefit of the children, the children are not necessary parties to an action to set aside the transfer as fraudulent and void against creditors, since the wife, being a trustee and a beneficiary, sufficiently represents the children under Rule 204.

Sections 39 and 40 of the Assignments Act, dealing with fraudulent preferences, applies to a conveyance to a creditor of an insolvent of land belonging to the latter, but standing in the name of another by whom the conveyance was executed.

Smith v. *Sugarman*, 13 W. L. R. 671, distinguished.

An action brought by plaintiffs, wholesale boot and shoe merchants, against Zalman and Gertie Zaslavsky, his wife, to set aside five transfers of land made by the former to the latter, as being fraudulent against creditors.

A. E. Hosken, K.C., and H. P. Grundy, for plaintiffs.

W. W. Kennedy, and F. C. Kennedy, for defendants.

MATHERS, C.J.K.B.:—The male defendant commenced business as a retail boot and shoe dealer in November, 1912. At that time he was the registered owner of five separate house properties in this city, subject to certain mortgages, and of three parcels of vacant city property, free from encumbrances.

On the 9th of June following, his total assets consisted of the above-mentioned real estate and a stock of boots and shoes, which he says was worth $4,500, but which was probably worth very much less.

The house property was valued at about $16,000, subject to mortgages of $7,900, leaving an equity of $8,100. The vacant lots were worth $900. He, therefore, had real estate standing in his name of the net value of about $9,000. Accepting his own estimate of the value of his stock-in-trade, his total assets amounted to $13,500. On that date, he owed trade creditors upwards of $4,200 and non-trade creditors (not including the claims of his wife hereafter referred to) $2,600, making a total liability of $6,800. It is quite manifest that without the real estate he was hopelessly insolvent.

On the 2nd of June, 1913, one of his trade creditors sued him for a trade debt of upwards of $500. On the 9th of June, he, by transfers under the Real Property Act, transferred all the house properties, subject to the mortgages against them, to his co-defendant, Gertie Zaslavsky, and subsequently certificates under the Real Property Act were issued to her, and these properties now stand in her name.

On the 22nd November, 1913, he, by further transfers under the Real Property Act, transferred the vacant lots also to his wife, and on the 15th of December following, she transferred these lots to her sister, Bertha Rosenfeld. This latter property now stands in Bertha Rosenfeld's name.

On the 27th December, 1913, Zalman Zaslavsky made an assignment for the general benefit of his creditors of his personal property, credits and effects, but not of his real estate. The assignee made an inventory of the property

assigned, and found that it amounted to $1,156.48. His liabilities notified to the assignee amounted to $3,800.

The plaintiffs recovered a judgment against the defendant Zalman Zaslavsky for $1,699.10, and this judgment is still unpaid.

It is admitted that no consideration passed from the wife to the husband upon the making of the transfers; but it is claimed that the transfers were made pursuant to an agreement entered into on the 21st of February, 1909, by which it was agreed that, in consideration of $1,200 then loaned by the wife to her husband, he agreed to repay the sum and in default, to transfer all his property to her for the benefit of herself and children. The agreement is in the Russian language and is in the words and figures following:—

"21st February, 1909.

"I, the undersigned, do hereby consent that my wife, G. Zaslavsky, for the sum of money which she lends me for a term no longer than three years, which sum of money amounts to one thousand and two hundred dollars ($1,200) at ten per cent. (10%) of interest per year could after three years and in the case the money is not paid before or on time stated above, insist on the payment of the full amount at any time through the bank or otherwise as she wants and finds it convenient.

"I do also consent, if she wishes so, that, in case I am not able to pay all amount in full in one year after the term stated for the payment, all my property and real estate to be transferred in her name and that by our mutual consent it belong to her for her and our children benefit forever, and that my rights to the property shall cease to exist for the benefit of my wife and children.

"I also consent and insist that my wife has no rights to sell any part or all of my real estate until our children become of full age in case I renounce and waive my rights to the above-mentioned estate when not being able to meet payment of one thousand and two hundred dollars with interest.

"(Sgd.) Z. Zaslavsky.

"Witnesses:

"J. Brown,

"A. Brown."

In transactions between relatives having the effect of defeating the claims of creditors, if the circumstances are suspicious, the onus is shifted to the purchaser of establishing

judicially the bona fides of the transaction: Langley v. Beardsley, 18 O. L. R. at p. 72, and Harris v. Rankin, 4 M. R. 115. The evidence to that effect must be clear and satisfactory evidence. For this purpose, the uncorroborated evidence of the parties to the transaction is in general not sufficient: Merchants' Bank v. Clarke, 18 Gr. 594; Osborne v. Carey, 5 M. R. 237; Ripstein v. British Canadian Loan & Investment Co., 7 M. R. 119; Ady v. Harris, 9 M. R. 127; Goggin v. Kidd, 10 M. R. 448.

Once the defendants have established that the agreement was bona fide made and that the consideration was actually paid, the onus is shifted back to the plaintiffs to prove an express intent to defraud, to which the wife was a party: 15 Hals. 84.

The circumstances surrounding the execution of the transfers in question are not free from suspicion. They were executed a few days after the male defendant had been sued by a trade creditor for a considerable sum. The instructions for their preparation and registration were given by the husband, and he continued thereafter to collect the rents, pay taxes and interest, and look after the repairs, just as he had done before. He said at the trial that after the transfer of the property, he gave the rents when collected to his wife; but, in his examination for discovery, he told a different story. He there said he put the rents with his other money. No reference is made in the transfers to the agreement now set up, but each purports to be made for a money consideration, now admitted to be fictitious. After the transfers, the wife, at the husband's request, gave a second mortgage on two of the houses to secure a debt of her husband's and for a fresh advance of $400 then made to the husband. After the transfer of the vacant lots, the wife re-transferred them to her sister in payment for his debt. He told two of the plaintiff's officers when they asked him about the transfer of this property to his wife that it had been made to his wife to defeat the creditor who had sued.

When about to commence business in November, 1912, he gave the plaintiffs, as a basis for credit, a statement of assets and liabilities. Amongst his assets, he includes all the properties transferred, but says nothing about any money owing to his wife, although the form of statement had a space for such an entry.

On the 1st of February, 1913, he also signed a statement of his affairs for the Union Bank. In this statement, he also includes both the house and vacant property amongst his assets. In the list of his liabilities, he mentions the mortgages on the improved property, his wholesale debts and his debts to the Union Bank, but nothing is said about any debt to his wife. The statement asserts that "he is the registered and actual owner of the lands and goods mentioned, which are not encumbered by mortgage or otherwise, except as stated therein."

The agreement provides for the conveyance to the wife of all the husband's "property and real estate," amounting in value then to probably $10,000, in default in payment of an alleged debt of $1,200.

In view of these circumstances of suspicion, I hold the onus of shewing the transfers were not voluntary, but for valuable consideration is open to the defendants.

The fact that the wife had money of her own is supported by the evidence of the husband and wife alone. Their story is that she had 2,400 rubles, equivalent to $1,200 Canadian currency, when they were married in Russia, fifteen years ago. Two thousand rubles she had inherited from her mother and the balance she had earned as a dressmaker. After marriage, both say she kept this money intact in a small bag suspended around her neck. Ten years ago, they came to Winnipeg, and it is said for the purpose of defraying their travelling expenses, she loaned her husband eight hundred rubles. The balance she brought with her. Both say that until the 21st February, 1909, when the agreement in question was entered into, a period of about five years, she kept this money in the sack which was suspended around her neck night and day.

Upon arrival in Winnipeg, the male defendant went to work at his trade of a journeyman tailor, and sometimes earned as much as $125 a month. When he received his wages, he gave them to his wife and received from her the equivalent in Russian paper money, and in this way the whole of the wife's 1,600 rubles became changed into Canadian currency.

Shortly after his arrival in Winnipeg, the husband bought the vacant lots in question in his own name, using for that purpose money which he had saved out of the 800 rubles given him to pay travelling expenses. The wife says that she

wanted him to put this property in her name, but that he put her off. About two years after arrival in Winnipeg, he bought a lot on the corner of Jarvis and Parr Streets, and erected a house upon it. About six months later, he bought the Lisgar Street property from his brothers-in-law, A. Brown and J. Brown. The price of this latter property was $1,900, but it was subject to a mortgage for $1,000 and to an agreement of sale for $400, leaving the vendors' equity at $500. This was paid by two promissory notes for $250 each. On the 21st February, 1909, he still owed on one note held by J. Brown $110 and to A. Brown $150.

During all these years, he says, he frequently tried to borrow from his wife the $800 which she had in the sack, but she always parried such requests by asking for the payment of the 800 rubles, or $400, which she had loaned to him in Russia. She says, however, that she induced her sister to from time to time lend him money. In February, 1909. he says, J. Brown was pressing for payment of his $110 and he had no money to pay. He told J. Brown that if he could induce his sister to lend him the $800 in the sack, he would pay him his money and that J. Brown induced her to agree to do this, by promising to get security, not only for the $800, but also for the $400 previously borrowed in Russia. This arrangement, it is said, was arrived at several days before the document was signed.

On the 21st of February, he says, there was a party at his house to celebrate the birth of his fourth child, born a few days before. His wife was still in bed. While the party was in progress, the agreement was written, it is said, by a young Russian who was invited to the party by J. Brown, but who was not known to any of those present and who has not since been seen by any of the parties. The document was signed, and witnessed by the wife's two brothers. It was then handed by J. Brown to the wife in bed and she took the $800 out of the sack about her neck and gave it to her husband. He did not that night pay his brothers-in-law the amount owing them, but says he did so a few days afterwards.

The two Browns who witnessed the document say that they saw her take money out of the sack on the night in question and give it to her husband. They did not count it and do not know how much it was. They, of course, are utterly unable to say that that money was her own property and had not previously been given to her by her husband.

Admittedly, the husband did give her his wages from time to time as they were paid to him and she put the money in the sack.

The husband and wife are, therefore, the only witnesses to the fact that she possessed money of her own. Under the circumstances, I cannot accept their evidence as establishing that fact. It may be that the agreement in question did come into existence on the occasion mentioned. In the view I take of the case, it is not necessary for me to make any finding one way or the other. If it were executed, I have no hesitation in holding that it was purely voluntary. It was at most a voluntary promise to transfer his property to her at a future time. The case of Harris v. Rankin, 4 M. R. 115, shews that such a voluntary agreement cannot be relied upon to support, as against his creditors, a subsequent conveyance of the property at a time when he is insolvent.

In my opinion, the transfers were fraudulent and void as against the plaintiffs.

The objection was taken that, as the trust was for the benefit of the children, as well as of the wife, the former were necessary parties. It would seem that, under Rule 204, the wife, who is trustee and also a beneficiary, sufficiently represents the infant children. I have read the cases cited by counsel for the defendants in support of this objection, but they all are quite distinguishable from this case.

It was also objected that Zalman Zaslavsky, the male defendant, was neither a necessary nor a proper party to the action. For the purposes of attacking the agreement set up in the statements of defence as having been made pursuant to a fraudulent conspiracy, the male defendant was, in my opinion, a necessary party, whatever may be said as to the propriety of making him a party at the commencement of the action. This objection also, therefore, fails.

There will be judgment declaring that the five transfers executed by Zalman Zaslavsky to his wife, Gertie Zaslavsky, on the 9th June, 1913, were and are fraudulent and void as against the plaintiffs, and that she is a trustee of the property for him: that the plaintiffs' judgment forms a lien and charge upon the land, and that it be sold, according to the ordinary practice, for the purpose of satisfying the charge.

The plaintiffs are entitled to the costs of the action.

KILGOUR v. ZASLAVSKY AND ROSENFELD.

MATHERS, C.J.K.B.:—This is an action to set aside the conveyance of the vacant property above referred to from Zalman Zaslavsky to his wife, and by the latter to her sister, the defendant Rosenfeld. The two actions were tried at the same time under an agreement by which the evidence given would apply to each action in so far as relevant. The vacant lots were not, it is stated, transferred to the wife at the time the improved property was conveyed, because Zalman Zaslavsky thought he might in a short time sell them. Gertie Zaslavsky says, when he failed to effect a sale, she asked him to transfer them to her pursuant to the agreement, and he did so.

I hold, for the reasons given in the other case, that the transfer of the vacant property by the male defendant to his wife was voluntary and was made with the intent to defraud the plaintiffs and his other creditors.

It is admitted that the defendant Rosenfeld was a creditor of the male defendant at the time the property was transferred to her to an amount about equal to the value of the lots conveyed, but it is claimed that these latter conveyances are void under secs. 39 and 40 of the Assignments Act, because made with intent to prefer the grantee over his other creditors.

The defendants' counsel contends that these sections in terms only apply to conveyances or transfers made by the insolvent himself and cannot be extended to conveyances executed by a third person to a creditor. In support of this contention, Smith v. Sugarman, 13 W. L. R. 671, a decision by the Full Court of Alberta, is referred to. In that case, it was found as a fact that the conveyance from the debtor to his wife was bona fide and that all parties regarded the property conveyed as the wife's. The property was, therefore, hers, to do as she pleased with, unless the conveyance was avoided by the provisions of sec. 42 of the Alberta Assignments Act, which is exactly the same as sec. 40 of the Manitoba Act. The Court held the conveyance by her to her husband's creditor did not come within the terms of the section. The present case, however, is very different. Here the transfer was merely a colourable device to get the property out of reach of his creditors. Both parties, I am satisfied, regarded the lots as still his and dealt with them as

such. The reason given for not transferring these lots at the same time as the improved property was transferred is that the husband withheld them in order that he might effect a sale of them, not for the purpose of turning the proceeds over to his wife, but to keep and use for his own purposes.

The instructions to prepare the transfers to the defendant Rosenfeld were given by the husband. At that time, the certificates of title for these lots were held by the bank as security for his account. He got them from the bank for the purpose of registering the transfers and the new certificates in the name of Bertha Rosenfeld were returned to, and are now held by, the bank for the same purpose. This was done on instructions from the male defendant without any request from the bank.

It would, in my opinion, be too narrow a construction to put on the Act to hold that a conveyance of land belonging to the debtor, but standing in the name of another, by whom the conveyance was executed, was not covered by the statute. If such were the case, every debtor could prefer any of his creditors at will by the simple expedient of first transferring the property to his wife or some third person, who would in turn convey to the favoured creditor. A debtor would thus be able to accomplish indirectly what the statute prevents him doing directly.

In my opinion, the transfers to the defendant Rosenfeld, though not executed by the hand of the debtor, were made by him within the meaning of the statute. As these transfers were executed within 60 days prior to the commencement of the suit they are utterly void as against the plaintiffs.

The same objection as to the want of parties and as to improper joinder of parties was taken in this case also, and are for the same reason overruled.

There will be judgment declaring the transfers of the property in question from Zalman Zaslavsky to Gertie Zaslavsky fraudulent and void as against the plaintiffs, that the transfers of the said property from Gertie Zaslavsky to the defendant Bertha Rosenfeld were made with intent to give said Rosenfeld a preference over the other creditors and are therefore utterly void; that the plaintiffs' judgment forms a lien and charge upon the said lands, and that the same be sold according to the usual practice to satisfy such charge.

The plaintiffs are entitled to the costs of the action.

ALBERTA.

WALSH, J. JANUARY 6TH, 1915.

TRIAL.

REVELSTOKE SAW MILL CO., LTD. v. ALBERTA BOTTLE CO., LIMITED, ET AL.

Mechanic's Lien—Erroneous Filing of Affidavit—Mechanics' Lien Act, Secs. 13, 14—90 Days—Sec. 35—Certificate of Proceedings—Public Lands and Buildings.

Plaintiff delivered material to defendant A. to be used in the erection of a factory on land owned by the city of Medicine Hat. The affidavit in support of the lien was filed in the office at Medicine Hat of an official who was deputy clerk of both the Supreme Court and District Court for the district of Calgary, was stamped by him with the filing stamp of the District Court and sent to the Land Titles Office.

Held, that sec. 13 of the Mechanics' Lien Act only applies to remedy a filing in the office of a clerk of the Supreme Court other than the office of the judicial district in which the land affected lies.

Held, that in the special circumstances the error in filing was cured by sec. 14 inasmuch as no prejudice had arisen.

Held, that the defect in the affidavit which described plaintiff as the Alberta *Plate* Glass Company Limited, was cured by sec. 14.

Held, that where the 90th day under sec. 35 falls on a Sunday the time is extended to the following day.

Held, that the certificate of proceedings required by sec. 35 need not specifically set forth that action is brought by party "to realize his lien" if the language sufficiently indicates that this is so.

Held, that land purchased for special public purposes which involve the purchase of materials for use in erection of buildings, is subject to the risk of liens for the same.

Held, that the Mechanics' Lien Act applied to the building in question.

McArthur v. *Dewar*, 3 M. L. R. 72; *Lee* v. *Broley*, 11 W. L. R. 39; *Limoges* v. *Scratch*, 44 S. C. R. 86: referred to.

A mechanics' lien action in respect of material sold to the defendant company and used by it in erection of a building on land of which the city of Medicine Hat is the registered owner.

C. S. Blanchard, for plaintiff.

W. A. Begg, K.C., for the City of Medicine Hat.

WALSH, J.:—Many objections to this claim, some of a technical and some of a substantial character, were urged on behalf of the city.

Section 13 of the Mechanics' Lien Act provides for filing the affidavit in support of the lien "in the Land Titles Office of the land registration district in which the land is situate or in the office of the Clerk of the Supreme Court of the Province in the Judicial District in which the land lies." According to one of the written admissions on which the case was tried the affidavit in this case was filed in the office of the deputy clerk of the District Court of the Judicial District of Calgary at Medicine Hat, which, of course, was not a compliance with the above quoted provision of section 13.

It was stated in argument and not denied that the gentleman who as deputy clerk of the District Court of Calgary at Medicine Hat received and filed this affidavit was at the same time the Deputy Clerk of the Supreme Court for the same district, at Medicine Hat, and that he carried on these two offices in the same room in the court house there. The stamp of the District Court on the affidavit bears upon it the words "S. A. Wallace, Deputy Clerk." I know, and I think I am entitled to use the knowledge that that is the name of the gentleman who at the date of this filing was such Deputy Clerk of the Supreme Court. The only evidence before me of any filing of the document, other than the admission to which I have referred, is the impression upon it of the District Court filing stamp. It looks to me as though Mr. Wallace had inadvertently picked up that stamp instead of that of the Supreme Court and impressed it upon the document, but of this there is no evidence. The lien reached the Land Titles Office from the District Court Office on the third day after its filing there. Two provisions of the Act are invoked in aid of this defective filing. The first of these is that part of sec. 13 which enacts that "no affidavit shall be adjudged insufficient on the ground that it was not filed in the proper registry office or clerk's office." I do not think that this meets the difficulty. My opinion of these words is that they are intended simply to cover the case of a filing in the office of a clerk of the Supreme Court other than that of the Judicial District in which the land lies and are not meant to validate a filing in any other place that could properly be called a clerk's office. The office of a District Court Clerk is certainly a clerk's office, but so is the office of a City Clerk or of a Police Court Clerk. No one would seriously contend that the filing of a mechanic's lien

in one of the two last named offices would be saved by this provision and neither in my view of it can a filing in the office of a District Court Clerk. The other provision relied upon is section 14, which provides that "a substantial compliance only with section 13 of this act shall be required and no lien shall be invalidated by reason of failure to comply with any of the requisites thereof unless in the opinion of the court or judge adjudicating upon the lien under this Act the owner, contractor, sub-contractor, mortgagee or other person is prejudiced thereby and then only to the extent to which he is prejudiced, and the court or judge may allow the affidavit and statement of claim to be amended accordingly." There is a great deal to be said in favour of the view that a filing in one of the prescribed places is just as much an essential to the continued existence of the lien as is a filing within the allotted time and that section 14 can only be relied upon to validate some defect in substance or in form which is found in a properly filed affidavit. The concluding words of the section "and the court or judge may allow the affidavit and statement of claim to be amended accordingly" lend strength to this contention. I was not referred to nor have I been able to find any Canadian authority on the point. Many American authorities are noted in support of the statement in 27 Cyc. at p. 132 that "it is necessary to the perfection of the lien that the notice, claim or statement should be filed in the place designated by the Statute," and of the statement in Rockel on Mechanics' Liens at p. 226 that "the claim must be filed in the place designated by statute," but none of them have been available to me and I am therefore unable to say of what value they are in determining this point under our statute. With a great deal of doubt, however, I think that under the facts of this case the plaintiff's lien is saved by this section. Section 13 has been substantially complied with in this respect by a filing with the very person and in the very office (speaking of it as a structure) with whom and in which it should have been filed. The filing of the affidavit may properly be described as one of the requisites of the section. There has been no suggestion of prejudice to anyone from this erroneous filing nor do I see how any could possibly have arisen. Mr. Wallace did everything as District Court Clerk which he would and should have done as Supreme Court Clerk. Any person wishing to know whether or not the lien had been filed would have ascertained that fact just as readily from him as if he had filed

it in the proper court. It is in the result as though being directed by statute to use his right hand in impressing the seal of the court on the document he had used his left. To hold this mistake fatal to the lien would give rise to this anomaly, that though filed in the right district with the right man and in the right place it is bad because through some unexplained mistake the stamp of the wrong court is impressed upon it, while it would have been quite good if filed with the clerk of the Supreme Court at Lethbridge, in the wrong district entirely and in a place where all sorts of prejudice might have arisen from the mistake, for it would have been saved by the provision of section 13 above referred to. I cannot take so narrow a view of the section as that and so I overrule this objection to the lien. At the same time I wish to guard myself against saying anything which would indicate an opinion upon my part that a filing in the wrong office under any circumstances other than those present can be cured by section 14. At the moment I can think of no circumstances other than those with which I am dealing which would justify the application of section 14 to them.

The affidavit describes the work as having been done for the Alberta Plate Glass Company, Limited, which is also referred to as being the equitable owner of the land. The name of this company then was the Alberta Glass Bottle Company, Limited. This mistake in the name of the contracting defendant is urged against the validity of the lien but this is so clearly within the curative provisions of section 14 that I cannot give effect to this contention. The plaintiff's solicitors should be devoutly thankful for section 14.

This action was commenced on the 2nd of May, 1913, which was the ninety-first day after the filing of the affidavit. The ninetieth day after that event, which was the last day within which the lien could under sec. 35 be saved by the commencement of proceedings to realize it, fell on a Sunday and that being so under sub-sec. 21 of sec. 7 of the Interpretation Act the time was extended to the following day and the action is therefore in time.

Section 35 provides that the lien shall cease to exist after the expiration of ninety days from the filing of the affidavit unless the claimant shall in the meantime have instituted "proceedings to realize his lien under the provisions of this

Act and a certificate thereof . . . . is duly filed in the Land Titles Office," etc. A certificate issued in this action was filed in the proper Land Titles Office setting out that "some title or interest is called in question in the following lands" (describing the lands as they are set out in the statement of claim) "under the Mechanics' Lien Act of Alberta." It is objected that this certificate is not in conformity with the requirements of section 35 inasmuch as it does not shew that the proceedings referred to in it were taken by the plaintiff "to realize his lien." I think that this objection also must fail. It is true that it does not appear from the certificate in so many words that the action was brought to realize the plaintiff's lien, but I think that the language used sufficiently indicates that such was its purpose. Strictly speaking no "title or interest is called in question" in a mechanic's lien action. The plaintiff has no title to or interest in the land. At best he has but a charge upon it. The owner's title or interest is not "called in question," it is simply sought to be affected by the charge of the claimant. And yet I think that anyone reading this certificate and seeing from it that the action was brought under the Mechanics' Lien Act and knowing that the lien of the plaintiff was recorded against the land would at once conclude that the action was brought to realize the lien and that I suppose is the object of requiring the registration of the certificate. The Registrar apparently had no trouble in determining what the certificate meant for he simply entered it on the certificate of title under its proper number and with its date and date of registration as "lis pendens re lien 4026 A. 5," which is the registered number of the plaintiff's lien.

This disposes of the technical objections to the plaintiff's right to succeed. The substantial objections rest upon the following facts. The defendant corporation (meaning the city) bought for industrial purposes a parcel of land of which that in question forms a part. The by-law authorizing the borrowing of money with which to make this purchase and which was assented to by the burgesses provides that it "shall be expended in the purchase of the above described property for industrial sites." Before this by-law was passed the corporation had agreed with one Ernest A. MacKay on behalf of himself and a company to be incorporated in Alberta as the Alberta Glass Company to convey

to him "all that piece of land situate in the City of Medicine Hat in the industrial property containing three acres more or less" upon the happening of certain events and the performance of certain conditions set out in it. This agreement was approved by the burgesses who appear to have voted on it on the 11th of April, 1912, although according to the certificate of the City Clerk it was not finally passed by the City Council until the 18th of April, 1914. I fancy, however, that this last mentioned date is a mistake of the clerk and that the by-law was really passed in 1912, but this does not appear to be material. It is admitted that the land covered by this agreement is the land in question. After the making of this agreement MacKay procured the incorporation in Alberta of a company known as the Alberta Glass Bottle Company, Limited, which name was afterwards changed to the Alberta Bottle Company, Limited. A building was erected by this company on this land. It was a term of the agreement with MacKay that he should equip this building with a plant of a specified value for manufacturing purposes and that the land covered by the agreement should not be conveyed by the city until the plant had been installed and in operation for sixty days. It is admitted that the installation of this plant has never been completed. It was to this company and for the purposes of this building that the plaintiff sold and delivered the materials for the value of which it now claims a lien.

On these facts it is contended by the city that this land is not chargeable with this indebtedness. It is said that the land is public property which was acquired by the city for certain public purposes, which purposes would be defeated if it is sold to satisfy the plaintiff's lien, and that it would be contrary to public policy to allow a lien to attach to it. I do not think that this objection is well taken. It is true that the land was acquired for certain purposes but in the carrying out of them was involved the purchase of materials in the erection of buildings upon it by those who acquired from the city the right to build on it with the inherent risk of liens attaching to it for their price. I think that the city must be assumed to have recognized the possibility of its purposes being defeated by just such an event as has here happened. It is urged in support of this contention that this land is not subject to the operation of the Mechanics' Lien

Act as the Act does not in express terms extend to the property of a municipality and it can only apply to it when the legislature in clear and explicit language has made it so applicable. Whatever may be said in favour of this view when applied to such municipal institutions as a city hall, a fire-hall, a police station and other structures in that category, I cannot think it applicable in such a case as this. The very purpose of the acquisition of this property by the city was the alienation of it for manufacturing purposes. It would undoubtedly be liable to seizure and sale under execution against the city and according to some of the authorities that is one test of its liability to a mechanics' lien. It was held in Manitoba that the Winnipeg City Hall was subject to mechanic's lien, McArthur v. Dewar, 3 M. L. R. 72. In Saskatchewan a school-house and the land on which it is situate were held so subject, Lee v. Broley, 11 W. L. R. 39. A fortiori and held for such a purpose as that for which this land was acquired must be liable.

The final contention is that the lien could only attach to such interest as the defendant company had in the property as it was at its request that the materials were furnished and as it never had any interest in the land at all inasmuch as the conditions of the agreement with the city were never performed, there is nothing upon which this lien can be fastened.

It seems to me that this case comes within Limoges v. Scratch, 44 S. C. R. 86. It is plain from the Mayor's examination for discovery at question 69 that the city authorities knew that this building was being erected in alleged fulfillment of the MacKay contract. There is no evidence of the posting of the notice called for by section 11, and I think the onus of proving that was on the defendant, the city. Whether or not therefor the contracting defendant had any interest in the land the registered owner knew that the building was being erected and failed to give notice under section 11 and the building must therefore in the words of section 11 be held to have been constructed at the request of such owner" with a consequent liability upon the land by way of lien to such claimants as can satisfactorily prove their claims.

There will be the usual mechanic's lien judgment except that the plaintiff will have no costs down to and including the trial. The plaintiff's proceedings down to and including

the issue of its certificate were filled with errors which doubtless helped to bring about this contest. I think that some punishment is due the plaintiff for the carelessness which led to the making of these mistakes and the consequent encouragement of this litigation and as none other than the deprivation of costs is available to me I will impose it.

ALBERTA.

WALSH, J. JANUARY 7TH, 1915.

TRIAL.

HOWSON v. MEDICINE HAT.

YUILL v. MEDICINE HAT.

Municipal Corporation—By-laws—Borrowing Powers—Purchase of Lands—Illegal Resolution—Electors' Right to Bring Action for Declaration.

By-law 346 of the city of Medicine Hat authorised the borrowing of money "to pay for widening, improving and grading certain streets" not naming them.

By-laws 370 and 418 of the said city authorised borrowing "to pay for grading and gravelling streets and purchasing road construction plant and machinery."

Held, that by-law 346 could not support a purchase of land for a street not in the city limits at the time the by-law was passed.

Held, that by-laws 370 and 418 could not in any case support a "purchase" of lands.

Held, that the authority conferred on electors by sec. 1 of title XXIV. of the charter of the said city to apply to quash a by-law or resolution of the council for illegality covered the bringing of an action for the same purpose.

Actions brought by electors of the city of Medicine Hat to have a resolution of the council for purchase of certain land declared illegal, and for further relief.

W. J. O'Neill, for plaintiffs.

I. C. Rand, for defendants.

WALSH, J.:—The resolution of which the plaintiffs' complain contemplated the expenditure of money for purposes which can only be lawfully accomplished under force of a

by-law to which the burgesses have given their assent. This much is clear from a reading of section 3 of Title XXI. of the city charter, which is the only provision of the charter conferring any power in this respect upon the council. It is admitted that the only by-laws in existence which justify the defendants in the action of which the plaintiffs complain are by-laws 346, 370 and 418, all of which received the necessary assent of the burgesses and were finally passed by the council. Each of these by-laws authorizes the borrowing of a certain sum of money, the first of them "to pay for widening, improving and grading certain streets," not naming them, and each of the other two "to pay for grading and gravelling streets and purchasing road construction plant and machinery."

The council under the impeached resolution has expended $6,000 in the purchase of land and proposes to make other large expenditures in the purchase of certain other land for the purpose of opening up a new road leading into the city over it and over certain other land shewn as a street on registered plans and in the construction of this road. I do not think that any of these by-laws can be relied upon to support this resolution or the action taken and proposed to be taken under it. By-law 346 certainly cannot, for a very essential part of the territory through which this proposed road is to run was not then within the corporate limits. Neither of the other two can because each of them is simply an authority for spending money on grading and gravelling streets, a vastly different thing from acquiring land on which to lay out a street and opening out as a public highway what was theretofore but a street on paper, a street shewn on a registered plan with no previous acceptance on the part of the corporation of the offer or dedication of it as a highway thereby shewn. The only authority therefore for what the defendants have done and intend to do is the resolution itself which is a manifestly inadequate authority in the face of the provision of the charter to which I have referred providing for the exercise of the council's powers in this respect only by a by-law approved of by the burgesses.

I think that the plaintiffs as ratepayers and electors of the city are entitled to maintain such an action as this. Section 1 of Title XXIV. expressly confers upon any elector the right to apply to quash any by-law or resolution of the council for illegality. That is exactly what this action is

brought for, coupled with an additional claim for relief based upon and incidental to the alleged illegality. It is true that this section gives only this right to move to quash and does not in terms extend that right to the bringing of an action but it is to my mind a recognition of the right of an elector to invoke the aid of the court to undo an illegal act committed by the council.

I am unable to understand why it was thought necessary to institute two actions to accomplish the end which the plaintiffs seek to gain. The plaintiffs in each action are practically the same and the same solicitors represent them. Both actions are founded upon the same illegality. One seeks a declaration that the resolution in question is illegal and that the defendant corporation be restrained from buying any more land under it and from paying out any more money either in the acquisition of additional land or in road construction. The other simply asks that the individual defendants consisting of those aldermen of the city by whose votes this resolution was passed be restrained from passing any further resolution for the construction of the road in question and from doing any other act looking to the payment out of money in that behalf. If this claim for relief was properly made, as to which I have my doubts, I can see no reason why it could not have been made in the other action. The actions were tried together and there is absolutely no dividing line between the evidence applicable to one of them and that applicable to the other. The same remark applies to the Mayor's examination for discovery which was taken at the one time in the two cases. I direct that the actions be consolidated and that in the consolidated action judgment go declaring the resolution in question illegal and restraining the defendants from further acting upon it and that the defendant corporation do pay the plaintiffs their costs as of one action.

ALBERTA.

WALSH, J. DECEMBER 16TH, 1914.

TRIAL.

GREAT WEST SUPPLY CO. LTD. v. G. T. P. RY. CO.

Carriers—Conversion of Carrier Into Warehouseman—Obligations of Warehouseman—Breach of Contractual Obligation to Keep Car of Goods in Certain Place—Liability for Loss of Goods—Limitation of Actions—Railway Act, Sec. 242—"Operation of the Railway."

In the absence of a special agreement to the contrary a carrier's liability becomes that of warehouseman where the contract of carriage has been properly performed, notice of the arrival of the goods at their destination has been promptly given to the consignee, and a reasonable time for the clearance through the customs of the car containing the goods and for the removal of the said goods has expired.

A warehouseman is not an insurer of goods committed to his charge. His obligation is that of bailee and he is bound only to use ordinary diligence in his care of them, but he must deliver them up to the owner unless he has a good excuse for not doing so. If the goods are not forthcoming the onus is upon him to shew circumstances negativing negligence on his part though he need not account for the loss or prove that he knows how it happened.

Where a warehouseman is under a contractual obligation to keep a carload of goods in a certain place until it has been cleared through the customs, and the goods are lost, without negligence, while the car is in a different place the warehouseman is liable in damages therefor.

***Lilly* v. *Doubleday*, 7 Q. B. D. 510, followed.**

Where a railway company in breach of its contract, as a warehouseman, with a bailor of goods used its rolling stock and its employees to put the said goods in a place where they should not have been put, it was *held*, that the loss occasioned thereby could not be considered as resulting from the "operation of the railway" within the meaning of sec. 242 of the Railway Act so as to preclude the bailor from bringing an action after the expiration of one year from the time the cause of action arose.

Action brought by the plaintiff as consignee of goods against the defendant, as warehouseman, for damages for the loss thereof, and for the recovery of money paid by the plaintiff to the defendant under a mistake of fact.

G. G. Dunlop, for plaintiff.

O. M. Biggar, K.C., and S. W. Field, for defendant.

WALSH, J.:—On the 5th of August, 1912, a car load of cement in bond consigned to the Western Home Builders' Company, Limited, reached Edmonton over the defendant's

line in a New York Central car. The plaintiff is admittedly, by some process not explained to me, entitled to stand in the position of this consignee with respect to this consignment and the events following its arrival in Edmonton. The plaintiff was at once advised of its arrival by notice which it received at 1 p.m. on the same day, but it did nothing with respect to it until the 27th of September, 1912, when, having found a purchaser for the cement, it paid the customs duty on the same and the defendant's charge for demurrage on the car in which it was then supposed to be and re-billed it in the same New York Central car to the purchaser at Imrie, paying the freight on this reshipment. The cement not having reached this purchaser in due course he so advised the plaintiff, who took the matter up with the defendant, with the result that the plaintiff later on was informed by the defendant that the cement had been unloaded from the car whilst it was in Edmonton.

The payment of the demurrage and the freight to Imrie was made by the plaintiff and accepted by the defendant under the mistaken idea on the part of both of them that the cement was still loaded in the car in which it came to Edmonton and that this car was then standing on the bonded spur in the defendant's yards. As a matter of fact the cement had been removed from this car more than a month before this and the empty car had more than three weeks before this started on its return journey to the east. It was established to my satisfaction at the trial that this car loaded with this cement stood on a Canadian Northern spur at Edmonton known as the Bellamy spur from at least the 9th until the 21st of August, that on the 22nd of August on its way back to the defendant's yards it reached the transfer track of the Canadian Northern empty, that it afterwards reached the defendant's tracks from this transfer track and that on the 5th of September it went east as an empty. The Bellamy spur served the plaintiff and three other dealers in the same block and was used by them for unloading into their premises adjoining the spur goods consigned to them. There is nothing to shew how the car got to this spur. It undoubtedly should have remained on the bonded spur in the defendant's yard at least until the duty was paid. The customs authorities do not seem to have consented to its removal from that spur nor does the plaintiff appear to have asked or instructed that it be so removed. The only infer-

ence I can draw from the facts is that the defendant's employees by mistake carried it to the Canadian Northern transfer track from which it was by that railway carried to the Bellamy spur. Neither is there anything to shew what became of the cement. I am satisfied that the plaintiff did not get it and I so find. I think the conclusion is inevitable that the cement was stolen and removed from the car on the 21st of August.

The defendant admits that it has no right to retain the money paid to it under the mistake of fact to which I have referred for demurrage and for freight to Imrie and it brings the amount of the same into court but the plaintiff insists that the defendant is liable as well for the full damage resulting to it from the loss of this cement, namely, the cost price of the same to it at Edmonton plus the duty.

I think it is clear that if the defendant is liable to the plaintiff at all it it so qua warehouseman and not qua carrier. It is in the former capacity that the plaintiff seeks to attach liability to it. The contract of carriage to Edmonton was properly performed. Notice of the arrival of the goods in Edmonton was promptly given to the plaintiff. A reasonable time for the clearance of the car through the customs and for the removal of the cement expired long before the theft of it took place. And these are the conditions which in the absence of special agreement to the contrary convert a carrier's liability into that of a warehouseman.

A warehouseman is not an insurer of goods committed to his charge. His obligation is that of a bailee and he is bound only to use ordinary diligence in his care of them, but he must on demand deliver them up to the owner unless he has in law a good excuse for not doing so. If they are not forthcoming the onus is upon him to shew circumstances negativing negligence on his part though he need not account for the loss or prove that he knows how it happened: Ultzen v. Nicols, [1894] 1 Q. B. 92; Bullen v. Swan Electric Company, 23 T. L. R. 258; Phipps v. New Claridges Hotel, 22 T. L. R. 49; Sutherland v. Bell, 3 A. L. R. 497.

The defendant has failed to deliver these goods to the plaintiff. It has satisfied me that they were stolen whilst the car was standing on the spur to which it had in error been taken by its employees. The only negligence urged against it in argument was the placing of the car on that spur instead of keeping it on the bonded spur in its own

yards. Two other grounds were set out in the particulars given by the plaintiff's solicitors but neither of them will stand investigation. One was "in delivering the goods in question to parties other than the consignees." That is not the fact. The other was "allowing the goods to be lost in some way unknown to the plaintiff" which does not advance the matter at all. The simple question therefore upon this head is whether or not the act to which I have referred constitutes negligence on the part of the defendant.

I have not been able to satisfy myself that it does. It is, of course, obvious that the cement must have remained in the car which brought it to Edmonton until the plaintiff cleared it at the customs. This had not been done at the time of the theft so that the cement was then of necessity still in that car. There is nothing in the evidence at all suggestive of any increased risk through the placing of the car on the Bellamy spur instead of the bonded spur. I would be inclined to think that of the two the former would be the safer. It is located well within the business area of the city, alongside the premises of the plaintiff and three other shippers where thieves should be in great danger of detection in so large an operation as that involving the handling of 800 sacks of cement. There is no magic in the bonded spur as a protection against burglars. It is designed for the convenience of the Customs officers. Upon it bonded cars are grouped so that they may be kept under the eyes of the officers and their supervision of them rendered more efficient. It is not suggested that the interests of the consignee of a bonded car are in any way safeguarded by the fact that it stands on this bonded spur until the duty is paid. I therefore cannot find negligence against the defendant.

There is, however, another ground upon which I think the defendant is liable. There was no express contract of bailment and therefore no express agreement that the goods should be warehoused in any particular place, that is that the bonded car should be kept at any specified spot. But upon the evidence before me I am satisfied that it was the duty of the defendant to keep the car on the bonded spur at least until it had been cleared through the Customs and the performance of this duty formed I think a part of the contractual obligation which the defendant was under to the plaintiff. Both parties acted upon this understanding for as I have said the matter was dealt with by them on the rebilling to Imrie on the assumption that the car ever since

its arrival in Edmonton had been and then was on the bonded spur.

Lilly v. Doubleday, 7 Q. B. D. 510, is a case in which the defendant contracted to warehouse certain goods for the plaintiff at a particular place, but he warehoused them at another place where, without negligence on his part, they were destroyed. The defendant was held liable to the plaintiff for this loss. Grove, J., said: "I think the plaintiff is entitled to judgment. It seems to me impossible to get over this point, that by the finding of the jury there has been a breach of contract. The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another and must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods must take place as inevitably at one place as at the other. If a bailee elects to deal with the property in a way not authorized by the bailor he takes upon himself the risk of so doing except where the risk is independent of his acts and inherent in the property itself."

Lindley, J., says: "I am of the same opinion. The plaintiff gave his goods to the defendant to be warehoused at a particular place, the defendant warehoused them elsewhere, where without any particular negligence on his part they were destroyed. The consequence is that the plaintiff has a cause of action and is entitled to damages."

Though this is but the judgment of a Divisional Court its correctness, so far as I have been able to ascertain, has never been questioned and it has very often been followed. I think that it is of close application in principle to this case and I have no hesitation in following it with the result, of course, that the plaintiff is in my judgment entitled to succeed.

This action was not commenced until the 5th of November, 1913, which was considerably more than a year after the plaintiff's cause of action arose. Mr. Biggar contends that it is barred under sec. 242 of the Railway Act. I cannot agree with this contention.

One of the defendant's locomotives was undoubtedly used to haul this car to the place to which it was improperly taken and to that extent "the operation of the railway" was involved in the damages sustained by the plaintiff.

I do not think, however, that that is sufficient to bring the case within that phrase as interpreted by the Privy Council in Canadian Northern Railway Company v. Robinson, [1911] A. C. at p. 745, namely, "the process of working the railway as constructed." It would, I think, be an undue widening of the term to hold that because the defendant in breach of its contract as a warehouseman with the plaintiff used its rolling stock and its employees to put the goods warehoused with it in a place where under the terms of the contract they should not have been put the resultant loss was occasioned by the operation of the railway.

The plaintiff is entitled to a judgment for the cost to it of the cement and sacks at Edmonton, the duty paid on the same, the demurrage and the freight to Imrie.

I have not the exhibits with me but these respective amounts can be ascertained from them by the clerk.

The money in court may be paid out to the plaintiff on account.

BRITISH COLUMBIA.

MACDONALD, J. DECEMBER 3RD, 1914.

TRIAL.

FRASER v. COLUMBIA VALLEY LANDS, LTD.

Vendor and Purchaser—Form of Conveyance—Land Described in Agreement of Sale With Reference to a Plan to be Registered—Non-registration of Plan—Undertaking by Vendor to Deliver Good Title—Land Described in Conveyance by Metes and Bounds—Conveyance Not Tendered Until Action Brought—No Notice Calling Upon Purchaser to Deliver Conveyance Within Reasonable Time—Right of Purchaser to Rescind.

Where A. agreed to sell to B., and "to deliver a clear title to," land described in the agreement of sale as "lot No. 1 according to a plan to be registered of part of a subdivision of District lot 7892. Kootenay District," it was *held*, that, there being no registered plan, B. was bound to accept a conveyance containing a description of the land by metes and bound.

Where under an agreement for the sale of land the purchaser has paid the purchase price but has not received a conveyance the proper course is for the purchaser to call upon the vendor to deliver the conveyance within a reasonable time, stating that, if this is not done, that the contract will be rescinded and an action brought to recover the purchase money.

Action brought by plaintiff, as purchaser, for the rescission of an agreement for the purchase of land and return of the money paid thereunder, or, in the alternative, for specific performance.

J. A. MacInnes, for plaintiff.

W. B. A. Ritchie, K.C., and J. G. Gibson, for defendants.

MACDONALD, J.:—Plaintiff, on the 11th day of July, 1908, purchased a parcel of land from the Nakusp Fruit Lands, Limited, under an agreement for sale. The description of the property in the agreement of sale is as follows: Lot number one according to a plan to be registered of part of a sub-division of District Lot 7892, Kootenay District, containing 1,250 acres more or less. The whole price was $1,080. He made the down payment of $270. The Nakusp Fruit Lands, Ltd., had purchased a large parcel of land from the defendant company and then subdivided it for the purpose of sale. Default having occurred, it released all its claims upon such property to the defendant company which assumed the benefits and obligations of any agreements for sale that had been entered into by the Nakusp Fruit Lands, Ltd. Defendant company sought the benefit of the agreement for sale with the plaintiff and in 1909 recognized him as a purchaser. The company pressed for payment and proposed to plaintiff that if interest were paid to extend time of payment of principal until the following year. The evidence of the plaintiff in this connection is supported by letters and by a receipt given by the defendant company under 16th August, 1909, for $48.50, being interest to July, 1909. Plaintiff negotiated with the defendant for a reduction in price on account of insufficiency of first-class land, and on the strength of a letter received from the agent, F. A. Courier, who had made the sale, obtained a concession in price, so that only $560 remained to be paid in order to entitle the plaintiff to a conveyance. It was contended that this reduction in price was given not only in consideration of the deficiency in first-class land, but was also based upon the inability of the defendant company to give title at the time and that it was agreed that the time should be extended for furnishing title. I accept the evidence of the plaintiff as to the sole ground for reduction being as stated by him. S. V. Roberts, secretary of the defendant company, was called as

a witness on behalf of the defendant and he did not support the evidence in this respect given by Hugo Carstons, president of defendant company on his examination at Winnipeg. I am satisfied that the entire arrangement arrived at between the parties is outlined in the letter from Roberts to the plaintiff dated May 5th, 1910.

I quote this letter at length:

"Winnipeg, May 5th, 1910.

"Henry S. Fraser, Esq.,
477 Spence Street,
Winnipeg:

"Dear Sir,

In reference to conversation with you some time ago I have now obtained authority to make you the following proposition, if you will in writing accept the following within one week of this date, that is, for the sum of Five Hundred and Sixty Dollars ($560.00), which includes principal, over-due interest and taxes on Lot 1, Block 7,892, Whatshan Valley, we will deliver you clear title for the aforesaid Lot. This is giving you a reduction of about three hundred dollars, interest and principal, and considering the location we think that you are obtaining a snap.

"Yours truly,

"S. V. Roberts."

Plaintiff became aware that the defendant company could not execute a deed to the property according to the description of the agreement but could convey by means of metes and bounds, but such mode of conveyance is not referred to in the letter. Subsequently plaintiff came to Vancouver, B.C., and seems to have had the impression, according to his letter of July 10th, 1911, to the president of the defendant company, that a deed for Lot 1, Block 7,892, would be registered in the Registry Office and wrote inquiring as to whether this event had taken place and that he was ready to make payment. He states he did not receive any reply to this letter. His troubles then began and he retained Messrs. Wade, Whealler, McQuarrie & Martin to act for him in the matter. On July 21st, 1911, defendant company, by letter of that date, stated that it would have the necessary papers drawn and forwarded without delay with reference to Lot 1, Block 7,892. This undertaking was not carried out. In July, 1912, plaintiff employed Messrs. Haney & Hill, solicitors in Vancouver, to act for him, and, presum-

ably, delivered to them all his papers in connection with the matter. They did not adhere to the provisions of the agreement for sale whereby the deed was to be prepared by the solicitors for defendant "at the expense of the purchaser," but prepared a conveyance themselves, following the description in the agreement for sale. This deed was enclosed to the defendant company on July 17, 1912, such solicitors stating that they were advised by the Land Registry Office that "the lot is registered in the company's name clear of all encumbrances," so the deed only required to be executed in order to close the matter. Defendant company acknowledged receipt of the deed on July 23, 1912, stating that the deed could not be executed until the return of its president when it would be forwarded at once. The deed was properly executed by the company and with some slight change in the description forwarded with draft attached. Plaintiff's solicitors having been placed in funds for that purpose retired the draft and then sought to register the conveyance. They were met with the difficulty that there was no certificate of title in the Land Registry Office, but, on this being overcome, they then found it impossible to register the conveyance on account of there being no plan registered, so that the description in the conveyance was defective. Correspondence then ensued and the company offered various excuses for the plan not being registered. The plaintiff was not, however, able to obtain registration of his conveyance. It does not seem to have occurred to his then solicitors to have sought a conveyance by metes and bounds, nor did the defendant company suggest such a course being pursued. There was a duty cast upon the defendant, after having received the purchase price, to take such steps as would enable the plaintiff to have his title registered, especially in view of the undertaking contained in the letter of May 5th, 1910. Their solicitors had inquired on October 30th, 1912, as to the registration of the plan and on November 8th, 1912, the president wrote such solicitors taking the ground that the solicitors for the plaintiff had accepted the conveyance and retired the draft for the amount due under the agreement for sale and presumed therefore that they could register such conveyance. He seemed satisfied to retain the purchase price and leave the plaintiff to worry about his title. The matter remained in abeyance until February 19th, 1913, when the defendant company inquired of its solicitors

whether in order to satisfy the demand of the plaintiff's solicitors the lot could not be described by metes and bounds "as the company is not now able to decide on a plan and would not want to register the old plan." Still the company did not offer to give the plaintiff a conveyance in this manner, and having sold in the meantime to one Beaton, the property became encumbered with mechanics' liens. This was explained to the plaintiff in a letter of the defendant company dated January 6th, 1914, in reply to his letters of December 8th, 1913, and January 2nd, 1914. Plaintiff then engaged another firm of solicitors—Bowser, Reid and Wallbridge—and they wrote the defendant company on the 27th January, 1914, stating that the deed received by the plaintiff was useless as there was no plan registered and they demanded payment of the money with interest, on the ground that defendant "had no title to the property," and the deed could not be registered. Defendant replied on 16th February stating that the company had a clear title to the property and the plaintiff knew when he accepted transfer thereof that the plan had not been registered, and that it would now be necessary to have a new survey made which would be done during the spring and that information would be given when the plan had been registered. This was not satisfactory and on February 16th, 1914, plaintiff's solicitors stated that, in default of repayment of the money, suit would be entered to recover same. This action was then brought (1) for rescission of the agreement and return of the moneys paid, or (2) in the alternative, for specific performance. It appears that at the time when the conveyance was given, defendant company could have described the property by metes and bounds and that a clear title could have thus vested in the plaintiff. Subsequently, this could not have been accomplished until the mechanics' liens were removed; but at the trial such a conveyance was proposed, though not formally tendered. Plaintiff refused to accept the conveyance, taking the ground that the property was of a speculative character, and it was too late now to force him to take title. Defendant, while setting up various grounds of a more or less technical nature in its statement of defence, did not make the offer as to giving the conveyance in the manner suggested at the trial. Plaintiff contended that the letters of his solicitors amounted to a rescission of the contract and that he was entitled to recover the moneys paid, with interest, expenses

and costs. It was argued that a conveyance by metes and bounds was not a compliance with the agreement for sale and that a conveyance should be according to a registered plan. I cannot see any virtue in the description being thus confirmed. I assume that the plaintiff purchased the property in good faith as fruit lands, and if by any mode of conveyance he obtained title, he had accomplished the end desired. In Laycock v. Fowler, 15 W. L. R. 441, the agreement provided that if the plan could not be registered, then the vendor should convey the actual land, describing it by metes and bounds, and this seems to have been there suggested as a satisfactory solution to the difficulty. That case turned on the failure of the plaintiff to obtain title and not on the form of the conveyance. I think both parties herein agreed and understood as to the parcel of land intended to be sold, and reference to the plan might, as to any other document, be used, in case there had been any dispute, to determine the description or designation of such property. See Ferguson v. Windsor, 10 Ont. Rep. 13; reversed in 11 Ont. App. 88, but not on this point; also Kenny v. Caldwell, 21 App. Rep. 110, 24 S. C. R. 699. As the piece of land in question was at the corner of the district lot, it could have easily been described and there would have been the surveyor's stakes on the ground to assist in a proper description. As to the vendor not being confined to the specific description contained in an agreement for sale, vide, Springer v. Anderson, 7 W. W. R. 529.

Plaintiff contends that, under the circumstances, he was entitled to a rescission of the contract, either by the letters referred to demanding payment, or by commencement of this action. He relies on Fortier v. Shirley, 2 Man. L. R. 269, and Gregory v. Ferrie, 14 W. L. R. 219, but both these cases dealt with the inability of the vendor to give title and the extent of the notice demanding that such title be produced and do not relate to the form of conveyance. In re Ryan and the District Registrar of Titles, 19 B. C. R. 165, decides that, where the plan of a subdivision has been rejected, the Registrar is bound to register a conveyance of the parcel of land intended to be described according to such plan, if the conveyance describe the property by metes and bounds and has a sketch plan attached. This being the state of the law, in my opinion, if defendant, after being called upon to give a conveyance by metes and bounds, had refused to do so then,

in view of the time that had already elapsed, this would have amounted to a rescission of the contract and the plaintiff would be entitled to recover payment of the moneys. Plaintiff, however, took a different course and claimed that there was a want of title in the defendant and for that reason the contract should be rescinded. I think the course indicated in Hatten v. Russell, 38 Ch. D. 346, should have been pursued, and that the plaintiff should have said to the defendant, "You have received the purchase price and agreed to give a conveyance and unless same be given within a reasonable time, the contract is repudiated and action will be taken to recover the moneys paid."

Some sections of the Registry Act were referred to in the pleadings and argument, but abandoned. No reference was made as to sec. 104 having any bearing upon the rights or liabilities of the parties.

It is further submitted that, in view of the time that had elapsed and the expense and trouble to which the plaintiff had been put, he is entitled to recover the purchase price. He certainly has suffered great inconvenience and been put to a great deal of trouble and expense. Defendant company has treated him in a casual manner, but his legal position was, I believe, as indicated. If I am right, that the defendant could compel the plaintiff to accept a conveyance by metes and bounds, then the difficulty in the conveyance drawn by the plaintiff's solicitors "was quite easy to remedy and it was not likely that any considerable time would be taken up in remedying it." While the plaintiff was thus, to an extent, in error, the defendant continued up to the time of trial in its total disregard of the plaintiff's rights and the duty was cast upon it of enabling the plaintiff to become a registered owner of the property. If it is desired to relieve itself from liability it should have executed a conveyance with proper sketch plan attached and tendered it to the plaintiff. It would thus appear it was only by this action, brought to trial, that the defendant was forced to realize its obligation. If it should now deliver a proper conveyance, it should still be liable for costs through its fault and neglect.

It should implement its offer, made through counsel at the trial, within a reasonable time. The defendant company is required on or before the 11th day of January, 1915, to execute and deliver to the plaintiff a conveyance capable

of registration and free from all encumbrances. In default of such conveyance being so delivered, the plaintiff is entitled to recover the moneys paid, together with interest and expenses. Plaintiff is entitled to his costs of action.

BRITISH COLUMBIA.

CLEMENT, J. NOVEMBER 27TH, 1914.

TRIAL.

GALLON v. ELLISON.

KNOWLES v. ELLISON.

Trespass — Spreading of Fire — Absence of Negligence — Damage to Adjoining Property—Forest Fires Act R. S. B. C. 1911, ch. 91—Contravention—Limitation of Actions.

Where A. without negligence sets a fire upon his land and the fire, being unwatched, spreads to the land of B. and there does damage, A. is liable in trespass to B. for the damage done. The fire was set in contravention of the Forest Fires Act, R. S. B. C. 1911, ch. 91, but B. not having brought his action within 3 months was precluded from recovering on the ground of statutory negligence.

Actions for damages for loss occasioned by fire which was set by defendant on his property and which spread to the property of the defendants.

McIntyre, for plaintiffs.

H. A. Maclean, K.C., for defendant.

CLEMENT, J.:—These two actions were tried before me at Vernon on the 31st ultimo and I then provisionally assessed the damages suffered by the respective plaintiffs, reserving the question as to defendant's liability upon the facts as I should find them. Upon further consideration I find the facts as follows:—

The fire which gave rise to these actions had its origin upon the defendant's land, being set out by his workmen in the early part of May, 1909. The defendant's land was admittedly within a "fire district" to which the Forest Fires Act (now R. S. B. C. 1911, ch. 91) would apply; consequently the setting out of the fire by the defendant's work-

men was in clear contravention of the statute as no permit had been obtained under the Act. Apart from this branch of the statute, I am unable to find that the fire was negligently started. By the next day, it had pretty well died down but in the middle of the day a wind storm, not abnormal or of unprecedented violence, swept up the valley, with the result that the fire begun by defendant's workmen and over which they were keeping no watch spread to adjoining properties and much damage was done, the plaintiffs in these two actions being among the sufferers. They did not, however, bring their action within the three months limited by the statute. The damage was done on May 3rd, 1909, and these actions were not begun until November 2nd of that year. The only other fact upon which it is necessary to find is whether or not the defendant's workmen were acting within the scope of their employment in setting out the fire in question. I find that they were. Notwithstanding the evidence of the defendant, it seems clear to me that these workmen were ordinary farm labourers hired to do anything that might require to be done upon the defendant's lands. Only a short time before Blondin, one of these workmen, had attempted to burn a clearing for a cabin at the defendant's express direction and under his personal supervision. That attempt was abandoned owing to the spot selected proving too wet and green; but that episode satisfies me that it was within the scope of the employment of these workmen to set out the fire in question, even if its setting out at this particular season was, as defendant said, contrary to his express orders. Upon this question I am entitled to make use of my own knowledge of conditions upon ordinary well-wooded farms or ranches in this province: see Citizens Life Assce. Co. v. Brown, [1904] A. C. 423; 73 L. J. P. C. 102; and, using that knowledge, I have no hesitation in finding as I have done. Lord Macnaghten in a recent case in the House of Lords—Lloyd v. Grace, [1912] A. C. 716; 81 L. J. K. B. at p. 1148—says that the phrases "acting with his authority," "acting in the course of his employment" and "acting within the scope of his agency," speaking broadly, mean one and the same thing. He adds: 'Whichever expression is used it must be construed liberally." The setting out of the fire in question was in the supposed interest of the defendant to burn away a lot of fallen timber and debris upon a sparsely wooded point or triangle of land which jutted out

between two of the defendant's meadows. Lloyd v. Grace (ubi supra) shews however that this is no longer a necessary separate enquiry and that the general proposition upon which must rest the defendant's liability in a case of this kind is that the principal is liable for the act of the agent in the course of the master's business and no sensible distinction can be drawn between the case of fraud and the case of any other tort. The phrase "in the course of the master's business" means the same thing as the other phrases above referred to.

In an earlier case, Derby v. Ellison, arising out of the same fire, the trial took place in the County Court of Yale, before His Honour Judge Swanson, who gave judgment for the plaintiff upon the ground of negligence on the part of the defendant's servants in taking no steps to prevent the fire from spreading to adjoining lands. There was no evidence before him that the defendant's lands were within a fire district and there was therefore no case of breach of a statute to be considered. He thought no case of vis major made out. An appeal was taken to the Court of Appeal but the judgments there are unreported. I have been furnished with a copy of the judgments of Mr. Justice Irving and Mr. Justice Galliher; and it was stated to me that the Chief Justice concurred in the dismissal of the appeal, giving oral reasons. Mr. Justice Galliher agreed with the learned trial judge that no evidence had been given that the defendant's lands were within a fire district and that no admission of that fact could be taken from the pleadings. Mr. Justice Irving treated the fact as admitted, but was of opinion that the fact that the servants' act was a breach of a statute did not free the defendant from liability if the act were otherwise within the scope of their employment. He cited Dyer v. Munday, [1895] 1 Q. B. 742, in support of his view. Lloyd v. Grace (ubi supra), might now also be cited. To my mind the defendant's contention on this point is quite untenable, but even if I were disposed to think otherwise I should certainly consider myself bound by the opinion expressed by Mr. Justice Irving. Mr. Maclean cited before me Wilson v. Rankin (1865), 34 L. J. Q. B. 62, as an authority in favour of the contrary view, but that case, when examined has, in my opinion, no bearing here. The plaintiff there sued upon a policy of insurance upon cargo. The defendant pleaded that part of the cargo had been stowed

by the ship's master upon deck contrary to a statutory prohibition, without alleging knowledge of that fact upon the part of the plaintiff, the ship's owner. The court held that such knowledge was necessary in order to avoid the policy and that it could not as a matter of legal intendment be imputed to the plaintiff in the case of such an illegal and unauthorised act as that of which the ship's master had been guilty. The ship, it was found, had not been made any the less seaworthy by the illegal stowage. No question, therefore, of damage to a third party arose at all in the case and in my opinion it has no application here; and, as already intimated, the cases which do bear directly upon the question arising here are clear, as Mr. Justice Irving, indeed, shews. Vis major was not argued before me.

Upon the facts, then, as I find them, the question is simply this: If A. without negligence sets fire upon his land and such fire being unwatched spreads to the land of B. and there does damage, is A. liable? The statutory negligence cannot be set up as these actions were not brought within the time limited by the statute; and so the question squarely arises as I have put it. It seems to me to be the same question which arose in Crew v. Mottershaw (1902), 9 B. C. 246, and which was determined by the Chief Justice in favour of the plaintiff who had suffered by the fire. As it is there put, it may be proper to call it negligence to omit any reasonable precaution, or to say that the duty (not observed here) is to take all possible precautions to prevent the fire from spreading: sic utere tuo ut alienum non laedes. In my opinion the action is really one of trespass. I so read Jones v. Festiniog R. W. Co. (1868), 37 L. J. Q. B. 214; and I so held in Woolbridge v. Patterson Timber Co. in January, 1912 (not reported). See also Black v. Christchurch Finance Co. (1892), 63 L. J. P. C. 32; and the judgment of Idington, J., in Laidlaw v. Crow's Nest Railway, 42 S. C. R. 355.

There will therefore be judgment for the respective plaintiffs with costs on the Supreme Court scale.

SASKATCHEWAN.

ELWOOD, J. DECEMBER 28TH, 1914.

TRIAL.

STRICKEE v. RUCKEMAN.

Vendor and Purchaser—Agreement for Sale of Land—Acceptance of "Title of Vendor"—Vendor Holding Option to Purchase from Owner Free from Restrictions—Restrictions upon Title Appearing upon Register—Forfeiture to Crown for Non-Performance of Condition—Non-Disclosure—Rescission.

A. was the registered owner of land the title to which was subject to a stipulation in the grant from the Crown that the land was liable to forfeiture to His Majesty upon failure of the grantee to place a settler thereon or to sell the same according to the requirements in that behalf contained in clause 44 of the Dominion Lands Act and amendments thereto. B. with the authority of A. gave C. an option whereby without any restrictions whatever B. agreed to sell to C. the land in question, there being no reference in the said option to the above restriction upon the title. D. agreed to purchase from C., one of the terms of the agreement of sale being that "the purchaser hereby accepts the title of the vendor to the said lands."

Held, that it was C.'s duty to disclose the restriction upon the title and, not having done so, that D. was not bound to accept the said title.

Re Haedicke & Lipski, [1901] 2 Ch. 666, followed.

An action brought by plaintiff for the recovery of the total balance due under an agreement dated the 29th of November, 1913, whereby the plaintiff agreed to sell and the defendant agreed to purchase land.

W. A. Boland, for defendant.

W. A. Doherty, for plaintiff.

ELWOOD, J.:—This action was commenced on the 29th day of December, 1913, and the plaintiff claims the total purchase-price by virtue of an acceleration clause contained in that agreement. At the trial, however, the plaintiff's counsel stated that he only desired judgment for the instalment overdue. The defendant objects that the title which the plaintiff proposes to give him is defective in that it is subject to a stipulation in the grant from the Crown that the land is liable to forfeiture to His Majesty upon failure

of the grantee to place a settler thereon or to sell the same according to the requirements in that behalf contained in clause 44 of the Dominion Lands Act and amendments thereto. Clause 44 is clause 44 of ch. 54 of the Revised Statutes of Canada of 1886. The certificate of title to the land in question is in the name of the First National Realty Co. Ltd., to whom the certificate was issued on the 28th day of February, 1910. At the time of the sale the only title that the plaintiff had to the land in question was an option given to him by the First National Investment Co. Ltd., whereby without any restrictions whatever the First National Investment Co. Ltd., agreed to sell to the plaintiff, the land in question on the terms therein mentioned, and in that option there was no reference made to the above restriction upon the title. It was proven at the trial that the First National Investment Co. had authority from the First National Realty Co., the registered owners of the land, to enter into the option and agreement of sale, hereinafter mentioned to the plaintiff. The option is dated the 14th day of November, 1913. By an agreement in writing under seal dated the 14th of November, 1913, the First National Investment Co. Ltd., agreed to sell to the plaintiff the lands in question, and by that agreement it was stated as follows: "The lands herein are legally vested in the First National Realty Co. Ltd., as trustees for the vendor, and are subject to clause 44 of the Dominion Lands Act." It was admitted at the trial that this latter agreement, although dated the 14th day of November, 1913, was not executed until after the agreement of sale between the plaintiff and the defendant. The agreement of sale between the plaintiff and the defendant inter alia contains the following: "The purchaser hereby accepts the title of the vendor to said lands." It was contended on behalf of the plaintiff that by the above clause the defendant was precluded from taking any objection to the title. A number of cases were cited in support of this proposition. In the case of Wilmot v. Wilkinson, 108 E. R. 538, the vendor covenanted to convey only such a title as he had received. In Duke v. Barrett, 63 E. R. 759, the purchaser agreed to accept the vendor's title without dispute. In Commercial Bank v. McConnell, 7 Grant 323, it was held that the purchaser had by his subsequent acts waived the right to examine the title. In Best v. Hamand, L. R. 12 Ch. 1, the agreement provided that the vendor should

assume and admit that everything, if anything was necessary, was done and performed by the company to enable them to sell and effectually to convey the said pieces of land as surplus lands. In Armstrong v. Nason, 25 S. C. R. 269, the agreement for the sale and purchase of the land contained the provision that the vendee should examine the title at his own expense, and have ten days from the date of the agreement for that purpose, and should be taken to have waived all objections to title not raised within that time. It seems to me that all of the above cases are quite different from the case at bar. In the case at bar the vendor gave evidence on his own behalf, and admitted that he had for three years known that the above clause 44 was registered against the land, that no person had ever lived on the land, and that he did not tell the defendant that this clause was against the land, and that he knew that it was practically necessary to perform homestead duties to get the clause removed. In Harnett v. Baker, L. R. 20 Eq. Cas. 50, upon the sale of an estate one of the conditions was that the title to the beneficial ownership should commence with the will of A. C., and the purchaser must assume that A. C. was at his death beneficially entitled to the property in fee simple free from incumbrances. A. C. had contracted before his death for the purchase of the property, and it was not until many years after his death that the title was made out, the property conveyed, and the purchase-money paid. It was held that the purchaser was not bound by the condition of sale. At p. 55, Sir R. Malins, V.C., said:—

"In the case of Spratt v. Jeffery, it was held that a stipulation precluding the purchaser from inquiring into the lessor's title was valid. That was afterwards thought to be unreasonable, and, therefore, in the cases of Shepherd v. Keatley and Warren v. Richardson, it was decided, and it is now finally settled as a rule of law, that although there be a stipulation that the title of the lessor is not to be shewn, although there may be any stipulation that a certain fact is not to be required to be shewn, if it turns out in the first case that the lessor's title is bad, and in the second case that the statement of the fact is erroneous, the purchaser may take advantage of the error, and although he is prima facie bound by the conditions, in the result he is not bound at all."

In re Marsh & Earl Granville, L. R. 24 Ch. D. 12, a contract of sale entered into provided that the title should com-

mence with an indenture dated the 18th of October, 1845, and made between persons whose names were mentioned, and that the earlier title should not be investigated or objected to. From the abstract of title delivered by the vendors to the purchaser it appeared that the deed of 1845 was a conveyance by a person who purported to be the owner of freehold and leasehold property to trustees in trust to himself for life and after his death in trust to sell the property and to hold the proceeds of the sale on the trusts declared by deed of even date. An express power was reserved to the grantor to revoke the trusts. The deed was a voluntary one, except for the consideration which resulted from the liability assumed by the trustees in respect of the leaseholds. It was held that inasmuch as the fact that the deed of 1845 was a voluntary one would influence the purchaser in determining whether he would agree to accept a title commencing within 40 years, the vendors ought to have stated in the condition of sale the nature of the deed, that the omission to state this rendered the condition a misleading one, and that the purchaser was not bound by the contract to accept a title commencing with that deed.

At p. 23, Baggallay, L.J., says:—

"There was not, in my opinion, such a full and explicit description of the deed given as he was entitled to."

And Cotton, L.J., says:—

"I am of the same opinion.

"All that we decide in the present case, and all that Mr. Justice Fry decided is, that the vendors knowing the nature of this deed, and not disclosing it, cannot by force of the stipulations in the contract claim specific performance without shewing a title extending over the statutory period."

In Bousfield v. Hodges, 33 Beav. at p. 90, the purchaser accepted the title, but having delayed in completing his contract, this suit was instituted against him for specific performance. At p. 94 I find the following:—

"As to acceptance of title, I assent to this proposition, that a purchaser is only bound by his acceptance of the title so far as he is made cognizant of it, and that if anything is kept back by the vendor he is not as to that bound by his acceptance."

In re Haedicke & Lipski's Contract, [1901] 2 Ch. 666, the agreement of sale of certain leasehold houses contained the following stipulation: "The vendor's title is accepted by

the purchasers." The leases under which the property was held contained onerous and unusual covenants the existence of which had not been disclosed by the vendor before the contract was entered into, and of which the purchasers had no notice. Held, that the condition as to the acceptance of the title did not affect the vendor's general duty of disclosure, and the purchasers were entitled to rescind the contract and to have the deposit returned with interest.

That case seems to me on all-fours with the case at bar: and in it the case of Bousfield v. Hodges was quoted with approval. See also Fry, 4th ed., 567 and 377, Edwards v. Wickware, 35 L. J. Ch. 48. It is quite true that at the time that the agreement of purchase was entered into the registered title did shew this clause as an encumbrance, but the title which the plaintiff had was the unconditional option to purchase which he had from the First National Investment Co. Ltd., and that company was not the registered owner. And it might well be argued that, with that option before him, the defendant would assume that the plaintiff would get a title free from any restriction whatever, and that he, not having received notice of the restriction which was upon the registered title, was not bound by it. In my opinion, on the authority of the above cases it was incumbent upon the plaintiff to have disclosed to the defendant the fact that there was the clause registered against the land. The effect of the clause is that unless the condition is complied with the land is liable to forfeiture. Under these circumstances I do not think that the title is one which should be forced upon the defendant, and the defendant is entitled to judgment.

There does not appear to have been any counterclaim by the defendant for the return of the purchase-money paid, and therefore so far as this action is concerned there will be simply judgment for the defendant dismissing the plaintiff's action with costs.

SASKATCHEWAN.

LAMONT, J. DECEMBER 24TH, 1914.

TRIAL.

McCALLUM, HILL & CO. v. IMPERIAL BANK, ET AL.

Landlord and Tenant—Covenant by Lessee not to Assign or Sublet without Leave — What Constitutes Breach of— Covenant by Lessor Not to Withhold Consent Arbitrarily —Effect of.

Mere letting into possession is not a breach of a covenant in a lease that the lessee would not assign or sublet without leave; there must be a valid legal assignment of the term to constitute breach.

Where a lease contained a covenant that the lessee would not assign or sublet without the consent of the lessor, consent not to be arbitrarily withheld by the lessor, it was *held*, that the effect of the covenant was, not to impose an obligation on the lessor to give his consent, but to enable the lessee to assign without consent in case the lessor unreasonably withheld it.

Consent was *held* to be unreasonably withheld where the assignee was unobjectionable as a tenant, and the business proposed to be carried on was exactly the same as that which had been carried on by the original lessee.

Action of ejectment.

J. F. Frame, K.C., and J. A. Cross, for plaintiffs.

J. A. Allan, K.C., for defendants.

LAMONT, J.:—This is an action of ejectment by the plaintiffs to recover possession of the premises known as lot 22 and the northerly six feet of lot 23, in block 284, in the city of Regina. The said premises were by an indenture of lease bearing date the 24th day of March, 1904, leased to the defendants, the Imperial Bank of Canada, by G. T. Marsh, the then registered owner, for a term of ten years, with an option of renewal for a further term of five years. The rent reserved was $150 per month. The lease contained the following clause:—

"And the said lessees hereby covenant with the said lessor that they will not, without leave, assign or sublet, the lessor undertaking that his consent will not be arbitrarily withheld."

On April 27th, 1911, Marsh transferred the said lands to the plaintiffs, who became the registered owners thereof. In

1912, the defendants, the Imperial Bank, who had erected bank premises of their own and had decided to occupy these premises, were approached by the defendant, the Merchants' Bank of Canada, with a view of taking over the lease of the premises in question. The Merchants' Bank made an offer of $370 per month for the premises. On September 7th, 1912, the manager of the Imperial Bank at Regina wrote the plaintiffs as follows:—

"I beg to advise you that it is our intention to lease our old bank premises to the Merchants' Bank of Canada upon the following terms of rent: $370 per month, and disposal of the fixtures, vault door, etc., at a price of $2,500. If you care to take over the lease upon these terms, please advise us."

There does not seem to have been any reply to this letter, but it is admitted that there were numerous interviews between the Regina manager of the Imperial Bank and the several members of the plaintiffs' firm, in which, according to the evidence of J. A. Wetmore, he verbally requested the plaintiffs' consent to the assignment of the lease, but the plaintiffs took the position that it had been agreed between them and Marsh when they purchased the property that Marsh would obtain the surrender or termination of the lease, and that, therefore, they could not consent to any assignment thereof. The Imperial Bank caused an assignment of their lease to be prepared and executed both by themselves and their co-defendants, but they did not then deliver it to the Merchants' Bank. On October 9th, 1912, the Imperial Bank wrote the plaintiffs as follows:—

"We send herewith duplicate of original assignment of lease, dated September 25th, 1912, from this bank to the Merchants' Bank of Canada of the premises at present held by us under lease from G. T. Marsh, and which, we understand, now belong to you. In this connection, we would refer to our manager at Regina's letter to you of September 7th, 1912, intimating our intention to lease the premises to the Merchants' Bank. We shall be glad if you will return the lease to us with your consent to assignment endorsed thereon or contained in a separate letter."

The plaintiffs got this letter on October 14th. On October 15th, the Merchants' Bank took possession of the premises. On October 22nd, the plaintiffs wrote to the Imperial Bank as follows:—

"Our consent to the assignment of lease by your Bank to the Merchants' Bank of Canada should have been requested before, and not after, the assignment was actually made and possession taken by the assignees. We must, therefore, decline to recognize or acquiesce in the assignment in any way. We also beg to notify you that, in view of your breach of covenant against assignment, we will in due course take such action as we may be advised."

On November 5th, the bank replied to this letter and pointed out that the assignment to the Merchanst' Bank had not yet been delivered, but that it still remained in escrow pending the granting or refusal of the plaintiffs' consent, also stating that if that consent were refused, the bank proposed taking the position that the consent was arbitrarily withheld within the meaning of the lease. The plaintiffs refused consent. On December 1st, the Imperial Bank wrote to the plaintiffs' solicitors that the bank proposed to complete the assignment of the lease to the Merchants' Bank by delivery of the assignment. This was accordingly done. The plaintiffs then brought this action.

For the plaintiffs, it was contended that the assignment of its lease by the Imperial Bank without the plaintiffs' consent constituted a breach of the covenant not to assign without such consent which enabled the plaintiffs, under sec. 83 of the Land Titles Act, to re-enter and take possession of the premises.

For the defendants, it was contended that, as the plaintiffs admitted that the Merchants' Bank was unobjectionable as a tenant, the consent to the assignment was arbitrarily withheld, and that, therefore, they had a right to assign without such consent.

The covenant of the lessees in this case was that "they will not without leave assign or sublet" the leased premises. This covenant is only broken by a legal assignment for the entire residue of the term. 18 Hals. 576. In Gentle v. Faulkner, [1900] 2 Q. B. 267, Lord Justice A. L. Smith, in dealing with a similar covenant, at pp. 273 and 274 said:—

"The covenant does not relate to the parting with the possession of the demised premises, but simply to the assigning or underletting of them. It is not said that the defendant has underlet the premises. It is said that he has assigned them. What, then, is the meaning of the covenant not to

assign the demised premises? In my judgment the meaning is not to execute a legal assignment."

Mere letting into possession is not a breach of the covenant. There must be a valid and legal assignment of the term. The Imperial Bank executed a legal assignment, but did not deliver it to the Merchants' Bank until December 1st. Prior to this, and in fact prior to giving possession, they had requested the plaintiffs' consent, which was not given. The question then is, was the omission or refusal of the plaintiffs to give the consent a breach of the undertaking not to withhold consent arbitrarily, and if so, did that entitle the bank to validly assign the term without such consent? In Bates v. Donaldson, [1896] 2 Q. B. 241, the lease contained a covenant by the lessee not to assign without license, such license not to be unreasonably withheld. The lessee desired to sell the term, and offered it to Bates, the lessor, for £400. He wanted the premises, but did not offer to pay the £400, whereupon the lessee assigned the term to the defendant without Bates's consent. Bates brought action to recover possession. Mathew, J., who tried the action, came to the conclusion that the defendant was unobjectionable as a tenant, and that therefore the plaintiff's consent was unreasonably withheld, and he dismissed the action. In appeal, Kay, L.J., said:—

"The only question which it is necessary to consider is whether, in the circumstances of this case, the refusal was reasonable within this covenant. . . . The lessee had a right to assign without his (the lessor's) permission if he withheld it unreasonably. Was it reasonable to refuse without making an offer to buy for himself? If he had answered the request for permission by saying, "I was in treaty with you to buy, and was ready to give the price you asked, and I now offer it to you," the case might have been different, but that, at least, he ought to have done. He did nothing of the kind."

And A. L. Smith, L.J., at p. 247, said:—

"Now, what is an unreasonable withholding of permission within the meaning of this clause? It is conceded by counsel for the plaintiff that if a tenant was desirous of assigning to a friend, it would be unreasonable for the lessor to withhold his assent for the purpose of breaking the lease, but it was said, if it was not to a friend, but to a stranger, and the lessor was willing to pay what the lessee wanted,

and as much as he could get from a stranger, it was not unreasonable to withhold his consent in order if possible to break the lease, if he wanted the premises for himself. That is not my reading of the clause. It is admitted that there is no case in the books which covers the present. Now when the lessor granted the lease he parted with his interest in the premises for the entire term. The tenant during that term can assign to any respectable or responsible assignee, in which case the lessor is bound not to unreasonably withhold his permission. It is not, in my opinion, the true reading of this clause that the permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term. It was in my judgment inserted alio intuitu altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce a tenant to surrender the lease so that the lessor might obtain possession of the premises."

Counsel for the plaintiffs relied upon two decisions, that in Burrow v. Isaacs, [1891] 1 Q. B. 417, and that in Eastern Telegraph Co. v. Dent, [1899] 1 Q. B. 835. In these cases it was held that where the lessees assigned or sublet the premises in forgetfulness of their covenant not to do so without leave, and therefore without asking for the lessor's consent, the Court could not relieve them from the effect of their assigning without consent. These authorities are undoubted law, but in my opinion they have no application to the facts of the case at bar. In these cases a legal assignment was made without any notice to the lessors or the asking of their consent. In the case at bar not only is this not so, but, on September 7th, the Imperial Bank notified the plaintiffs of their intention to assign and offered the premises to the plaintiffs on the same terms as they subsequently obtained from the Merchants' Bank. Then, between September 7th and October 14th, the manager of the Imperial Bank had verbally requested the plaintiffs' consent of the assignment. By the letter of October 9th, they requested this consent in writing. At this time the assignment, although executed, had not become operative as it had not been delivered; it was being held pending the consent or refusal of the plaintiffs; and it was not until the absolute refusal of the plaintiffs to give their consent that the assignment was

delivered and became a valid and binding assignment. There is no similarity between these facts and those which existed in the cases relied upon by the plaintiffs' counsel, and the principle of these cases is not applicable here. The clause in the lease against assigning without leave was put in for the lessors' protection, to assure the asking of his consent before such assignment was made. This enables him to ascertain whether or not the proposed assignee would be objectionable as a tenant, or the business which he would carry on on the premises be undesirable. The clause in the lease providing that the lessors' consent would not be arbitrarily withheld was put in for the protection of the lessee, to enable him, if the lessor refused his consent, to the assignment of the term to an unobjectionable assignee to complete such assignment without that consent. If a valid and binding assignment is made without the lessor's consent being asked for, the lease is forfeited and the lessor has the right to repossess the premises, as was held in Burrow v. Isaacs and Eastern Telegraphs v. Dent. But if, before a valid and binding assignment is made the consent of the lessors is requested, the refusal of such consent can only be justified if the proposed assignee or the business he is to carry on upon the premises is found to be objectionable. The effect of the clause not to withhold consent arbitrarily is, not to impose an obligation on the lessor to give his consent, but, in case it is unreasonably withheld, to release the lessee from the obligation of the covenant and to enable him to assign without such consent. Andrew v. Bridgeman, [1907] 1 K. B. at p. 198; West v. Gwynne, [1911] 2 Ch, 1. In the present case the proposed assignee was unobjectionable as a tenant, and the business proposed to be carried on was exactly the same as that which had been carried on by the Imperial Bank, the original lessees. The withholding of the consent by the plaintiffs was therefore, in my opinion, arbitrary and unreasonable, and the Imperial Bank was justified in completing the assignment without their consent.

The action will therefore be dismissed with costs.

THE

Western Law Reporter

VOL. XXX. TORONTO, FEB. 8, 1915. No. 7

MANITOBA.

JANUARY 5TH, 1915.

COURT OF APPEAL.

McGALE v. SECURITY STORAGE CO.

Bailment—Loss of Goods in Possession of Bailee not Covered by Contract of Bailment—Bailee Violating Contract—Measure of Damages.

A. stored with B. two articles of furniture, the drawers of which were filled with goods and locked. This was known to B. A receipt was given for the two articles, but no mention was made in the said receipt of the contents of the drawers. Upon parting with the articles B., without the authority of A., removed the said contents which were afterwards lost.

Held, that B. was liable in damages to A. for the value of the goods lost, the loss having occurred when B. was acting in violation of the contract of bailment.

Harris v. *G. W. Ry. Co.*, 1 Q. B. D. at p. 534; *Lyon* v. *Mills*, 5 East 428; *Davis* v. *Garrett*, 6 Bing. 716; applied.

Where goods come into the possession of a bailee and are not intended, either by the bailor or bailee, to be covered by the contract of bailment and are lost by the bailee, the latter is liable in damages for the value of the goods.

Appeal by defendant from the judgment of DAWSON, Co.C.J., in favour of plaintiff in an action for damages for the loss of plaintiff's goods while in the possession of defendant.

The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON, and HAGGART, JJ.A.

J. B. Hugg, for defendant, appellant.

J. T. Beaubien, for plaintiff, respondent.

HOWELL, C.J.M.:—When the plaintiffs stored with the defendants the dresser and chiffonier, the drawers were filled with miscellaneous goods and were locked, and the evidence shews that the defendants knew this. These goods are not given in detail in the receipt but merely the two articles of furniture. When the two articles of furniture were about to be handed over to Lewis, the defendants unlocked, or pried open, the drawers and took out the contents. This was not the wrongful or negligent act of one of the de- [illegible] but an act deliberately done pursuant to [illegible] agreed upon, and thus [illegible] the goods not justified under [illegible] authority from the plain- [illegible] when they were acting in [illegible] mentioned by Lord [illegible] 1 Q. B. D. at 534, [illegible] and Davis v. [illegible] referred to by him apply. [illegible] in another way. [illegible] either party in- [illegible] and were [illegible] The case then [illegible] of the plaintiffs' [illegible] the alleged receipt [illegible] to argument. [illegible] I think his [illegible]

[illegible] that the defend- [illegible] the contract [illegible] of the [illegible] the contents [illegible] the sum of [illegible] and an [illegible] Here [illegible] there any notation [illegible] made in [illegible] respect of the two packages said to have been lost.

Zung v. South Eastern Railway, L. R. 4 Q. B. 539, was a case in which the plaintiff took a ticket to be conveyed as a passenger from London to Paris on which was printed: "The South Eastern Railway is not responsible for loss or detention of, or injury to luggage of the passenger travelling by this through ticket except while the passenger is travelling by the South Eastern Railway Company's trains or boats." The plaintiff did not sign this memorandum. The plaintiff's luggage was lost between Calais and Paris on a French railway and Cockburn, C.J., on p. 544, says: "However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print upon the ticket, which he only gets at the last moment after he has paid his money, and when nine time out of ten he is hustled out of the place at which he stands to get his ticket by the next comer,—however hard it may appear that a man shall be bound by conditions which he receives in such a manner, and moreover when he believes that he has made a contract binding upon the company to take him, subject to the ordinary conditions of the general contract, to the place to which he desires to be conveyed,—still we are bound on the authorities to hold, that when a man takes a ticket with conditions on it he must be presumed to know the contents of it, and must be bound by them."

Skipwith v. Great Western Railway, 4 T. L. R. 589; Pratt v. South Eastern Railway (1897), 66 L. J. Q. B. 418, are cases where articles were lost which had been left at the cloak or check room of railway stations. The conditions on the back of the ticket limiting the amount of damages recoverable are binding upon the bailor. The bailees receiving the goods have a right to name the terms of the bailment.

Here the condition limiting the liability to $25 on each package and its contents is on the face of the document and is in large and prominent type. Under ordinary circumstances, on the authorities above mentioned the defendant would be liable only for the two packages and the damages would be $50.

The bailees removed the contents of these two packages by forcing the lock. They endeavoured to justify this action by conversations with the plaintiff. There is a conflict of testimony as to what did take place. The trial judge has accepted the plaintiff's version. I doubt whether I would have come to the same conclusion, but I do not feel justified

in reversing his finding upon this point. There are some suspicious circumstances, such as the warehousing of jewellry in the manner described by the plaintiff. By reason of this change then these detached articles taken from the dresser and chiffonier would not be valued according to the measure given in the original contract of bailment. I suppose the value of these articles is the measure of damages.

It is with some reluctance I come to the conclusion that the appeal should be dismissed.

RICHARDS, PERDUE, and CAMERON, JJ.A., concurred with HOWELL, C.J.M.

Appeal dismissed.

MANITOBA.

JANUARY 5TH, 1915.

COURT OF APPEAL.

LOBEL v. WILLIAMS.

Vendor and Purchaser—Completion of Purchase—Delay of Vendor in Delivering Conveyance—Possession—When to be Taken—Measure of Damages.

Damages can be recovered by a purchaser from his vendor for delay in completing the purchase, where the delay has been occasioned by the default of the vendor, not in consequence of want of, or defect in title or in consequence of conveyancing difficulties, but by reason of the vendor not having used reasonable diligence to perform his contract.

Jones v. *Gardiner*, [1902] 1 Ch. 191, followed.

Although a purchaser after the execution of the agreement for sale is entitled to enter into possession of the property which is the subject of the agreement, he is not bound, and will not be compelled, to enter into possession where it might or would not be prudent for him to do so. Where the vendor was merely the agent for the personal representative of a deceased owner, it was *held*, that it was not prudent for the purchaser to take the risks of entering into possession before a conveyance had been delivered.

The acceptance by the purchaser, after bringing an action, of money for grass cut on the property which he had agreed to purchase, does not constitute a waiver of his rights.

Action brought by the plaintiff to recover from the defendant the exchange value of land which defendant had failed to convey under an agreement for the exchange of

lands. During the pendency of the action a conveyance had been executed. This is an appeal from the judgment of GALT, J., who dismissed the action. The only relief which plaintiff sought on appeal was a reference to fix the damages sustained by him by reason of the delay in furnishing him with the transfer to which he was entitled under the exchange agreement.

The appeal was heard by RICHARDS, PERDUE, CAMERON, and HAGGART, JJ.A.

A. Hollands, for plaintiff, appellant.

A. E. Hoskin, K.C., for defendant, respondent.

CAMERON, J.A.:—In this action a few days before the trial the defendant caused to be executed and registered a transfer of the lands in question in Saskatchewan. This has been accepted by the plaintiff, and the claim for $9,050, the exchange value of the lands, has been abandoned. The only relief now asked by the plaintiff, under the amendment to the statement of claim of October 24th, 1914, is for a reference to fix the damages sustained by the plaintiff by reason of the delay in furnishing the plaintiff with the transfer to which she was entitled under the agreement.

The agreement was dated February 18th, 1913. It was followed, within a few days, by performance on the part of the plaintiff. But owing to circumstances not clearly disclosed, the personal representative of W. B. Nicol, (for whom the defendant was acting) did not, though repeatedly requested so to do, convey the lands (agreed to be conveyed by the defendant) until October 17th, 1914. This action was commenced July 10th, 1914.

The learned trial judge, in view of the fact that the conveyance or transfer had been made before the trial, dismissed the action.

The general rule is that damages are not recoverable (in the absence of fraud) where the contract goes off through defect in title. This law was laid down in Bain v. Fothergill, L. R. 7 H. L. 158, affirming Fleureau v. Thornhill, 2 W. Bl. 1078, and over-ruling Hopkins v. Grazebrook, 2 B. & C. 31. "If a person enters into a contract for the sale of a real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of

the contract: he can only obtain other damages by an action of deceit," per Lord Chelmsford in Bain v. Fothergill, supra, at p. 207. "This is an exception to the ordinary rule of common law, that where a person sustains a loss by reason of a breach of contract, he is prima facie entitled, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." Mayne, Damages, p. 241. (It is to be noted that the doctrine laid down in Bain v. Fothergill has not been generally accepted in the United States.) But, on that exceptional rule there have been grafted exceptions. One of these is where the contract fails for want of title, but a defect which the vendor ought to have removed and could have removed: or not so much from an inability to make title, but a refusal to do so. See Engel v. Fitel, L. R. 2 Q. B. 314, affirmed L. R. 4 Q. B. 659, which was not affected by the decision in Bain v. Fothergill (See Lord Hatherley, at p. 209). There is an understanding that any contract for the sale of real estate may fail for want of title, but no such understanding that it may fail because the vendor does not choose to go to the expense or trouble of performing his part of the contract.

In Day v. Singleton, L. R. [1899] 2 Ch. 320, there is to to be found a striking example of this. In Jones v. Gardiner, [1902] 1 Ch. 191, it was held that damages can be recovered by a purchaser from his vendor for delay in completing the purchase, where the delay has been occasioned by default of the vendor, not in consequence of want of, or defect in, title or in consequence of conveyancing difficulties, but by reason of the vendor not having used reasonable diligence to perform his contract. This decision seems to me decisive on the point. Among other cases referred to in the judgment in Jones v. Gardiner are Jaques v. Millar, 6 Ch. D. 153, and Royal Bristol Permanent Building Society v. Bomash, 35 Ch. D. 390. I refer also to the dictum of Turner, C.J., in Williams v. Glenton, L. R. 1 Ch. at p. 209.

It was urged that the plaintiff by her acts and conduct had waived any rights she may have had to damages. But there is nothing to shew that the plaintiff ever intended to absolve the defendant from performing his part of the contract. The contrary is the case. And as she held the defendant to his contract she cannot be taken as having voluntarily surrendered any of the rights incidental thereto, in the absence of more positive evidence than we have before us.

The point is made that the plaintiff by virtue of the contract became the real owner of the property, and that thereby she became entitled to its possession, and could have taken possession without delay upon the execution of the contract, and that, therefore, the defendant cannot be chargeable with damages by reason of the plaintiff's delay in taking possession.

In England, as between vendor and purchaser, the purchase is to be completed when the vendor shews a good title. Thereupon the purchaser prepares a conveyance and tenders the same for execution and tenders at the same time the purchase money. The vendor then executes the conveyance and gives possession to the purchaser. Williams, V. & P. 46. This is the law in this province, except that it is the duty of the vendor to prepare and tender the conveyance.

In the case of an open contract, the time for completion is the time when the vendor shall have shewn a good title. Williams, V. & P. 26. Pending the completion of the purchase the vendor shall retain possession of the property sold and shall manage and preserve it with the same care as trustee is bound to use with regard to the property subject to his trust, Ib. p. 50. As the result of the purchaser's equitable ownership of the property sold and the vendor's consequent trusteeship for the purchaser, the vendor is bound while he remains in possession, to take reasonable care to preserve the property in the same condition in which it was at the date of the contract for sale, Ib. 512. The vendor is bound to execute at his own expense such repairs as are necessary to preserve the property from deterioration until the proper time for completion of the contract, Ib. 513. See Sherwin v. Shakespeare, 5 DeG. M. & S. at 517. I dealt with some aspects of this subject in Major v. Sheppard, 18 M. R. 511.

Even where the contract provides that the balance of the purchase money shall be paid on a particular day and that possession shall be taken by the purchaser on that day, it has been held that such possession is intended as may safely be taken. Williams, 516-517. The purchaser is not bound to take possession until a good title has been shewn.

In this case it is true the purchaser might have taken possession, but she was not bound to do so, and it might and would not have been prudent for her to do so. Between February, 1913, and September of last year the matter was pressed upon the defendant's attention. The defendant was

not the vendor, but agent merely for the personal epresentative of a deceased owner. In my judgment the plaintiff was not bound to take the risks involved in taking possession. The acceptance of the money for grass cut on the premises after action brought was not an act of such consequence as to constitute a waiver with knowledge on her part of its alleged effect, of the plaintiff's rights. The defendant never offered possession and the plaintiff was never in default in any way. It seems to me that the plaintiff has made out a clear case for relief.

In Foster v. Deacon, 3 Madd. 394, Vice-Chancellor Leach held that, on a sale of certain lands, where the purchaser was kept out of possession by difficulties in the title, even though an offer of interim possession was made by the vendor, the vendee was not bound to accept it, and could not prudently accept it. He made a reference to the Master to ascertain what deterioration, if any, the lands had suffered, and to what amount, by unhusbandlike conduct the mismanagement of the lands since the date of purchase. See Royal British v. Bomash, 35 Ch. D. 390, where the judgment of Fry, J., in Jaques v. Millar, 6 Ch. D. 159, is quoted and followed on the point of giving damages in addition to specific performance, and where Foster v. Deacon, Phillips v. Silvester, and Egmont v. Smith are considered and followed on the question of the duty of vendors. (See p. 398.) In Phillips v. Silvester, L. R. 8 Ch. 172, Lord Selborne states at p. 178: "it is true that each party is entitled to refuse to alter the possession until the whole contract is completed."

In Egmont v. Smith, L. R. 6 Ch. D. 469, it was held by Lord Jessel, that where a vendor of a farm subject to a yearly tenancy, finds that the purchase cannot be completed, on the appointed day, and that the tenancy will determine before then, it is his duty as trustee for the purchaser, to relet the farm in order to prevent it going out of cultivation.

The duty of the vendor, pending completion, is thus succinctly stated in Williams, at p. 512: "The vendor must take the same care that a prudent owner would take of his one property."

In this case the plaintiff promptly carried out her part of the agreement. She was out of possession of the land agreed to be given in exchange for a year and a half. Had the land been money she would be out of pocket interest on the $9,050 agreed on as its value. On the soundest prin-

ciples she is entitled to damages for being out of possession of the land in the one case or of the money in the other, which latter damages would be measured by the interest.

I would set aside the judgment appealed from and direct a reference to the Master, substantially in the terms set out in Foster v. Deacon, to inquire what loss the plaintiff has sustained by being deprived of the use and occupation of the said lands during the period between the date of the agreement and the date of the transfer, and what damage, if any, has been occasioned to the said lands by reason of the same being unoccupied and uncultivated, and also what deterioration to the buildings and fences thereon, and if any, to what amount, by the conduct and mismanagement of the said lands and buildings by the defendant during the period aforesaid.

I think the plaintiff is entitled to the costs of this appeal and of the action. The costs of the reference are to follow the result.

It does seem to me a case where the costs of a reference can well be avoided by agreement of the parties. Clearly, if the lands and premises have depreciated as a consequence of the defendant's delay in making title, then surely the plaintiff, from the point of view of equity and common sense, is entitled to compensation.

It might be suggested that the payment of interest on the exchange value of the lands between the date of the contract and that of the transfer would meet the demands of justice. I can, however, find no authority for adopting interest as necessarily or properly the measure of damages. It might be excessive or, on the other hand, altogether inadequate. The matter, however, is one susceptible of settlement. But if the parties fail to agree the reference must be proceeded with.

HAGGART, J.A.:—The plaintiff sues upon an agreement made with the defendant to exchange certain lands in Manitoba belonging to the plaintiff for certain lands in Saskatchewan belonging to the defendant. The plaintiff's lands were more valuable than the defendant's and it was agreed that that excess of value should be $5,450, which sum the defendant should pay to the plaintiff. The plaintiff's lands were conveyed to the defendant and the defendant paid the said sum of $5,450.

The lands in Saskatchewan stood in the name of one W. B. Nicol, deceased. His widow had administered to the husband's estate in Manitoba, and before she could give title to the Saskatchewan farm it would be necessary to have the letters of administration sealed in that province. There was some dispute or trouble as to adjusting the succession duties and the widow was not in a position to convey for considerably over a year.

The plaintiff sued on the agreement for the sum of $9,050, being the value of the Saskatchewan farm.

During the pendency of the suit the farm became vested in Mrs. Nicol, who executed a transfer to the defendant and the land is now registered in the defendant's name.

The trial judge dismissed the action and the defendant's counterclaim without costs. The plaintiff appealed and contends that there should be a reference to the Master to ascertain the damages sustained by her by reason of her not being vested with the land she purchased until nearly two seasons had gone by, the crops of which she says she lost.

Where a vendor is unable to make title to the purchaser there are two courses open to him; he may refuse to complete the purchase and repudiate the contract, or he may require the vendor to convey that to which he can make title and to submit to proportionate abatement of the purchase money. The law was very fully discussed in Ontario Asphalt Block Co. v. Montreuil, 29 O. L. R. 534 and the old cases of Bain v. Fothergill, 1874, 7 H. L. 158; Rankin v. Sterling, 1902, 3 O. L. R. 646; Horrocks v. Rigby, 1878, 9 Ch. D. 180; Day v. Singleton, [1899] 2 Ch. 320.

The defendant contended that an action for damages would not lie for more than the expenses incurred in investigating the title. Here we must not forget that the plaintiff was not the owner of the land she bargained for for nearly two seasons. I do not think it is an answer that the defendant was not in possession and that the plaintiff was entitled to go into possession at any time she thought fit. The plaintiff was entitled within a reasonable time, to be vested with the complete ownership so that she could deal with the property in any way she thought proper.

In Jones v. Gardiner, [1902] 1 Ch. 191, it was held that damage can be recovered by a purchaser from his vendor for delay in completing the purchase where the delay has been occasioned by default of the vendor not in consequence of,

or defect in, title, or in consequence of conveyancing difficulties but by reason of the vendor not having used diligence to perform his contract. And in that case the authorities above cited were also referred to by Byrne, J. See also Jaques v. Millar, 6 Ch. D. 153, where it is held that damages may be given against a vendor in addition to specific performance in respect of delay caused by refusal to carry out a contract.

I think the plaintiff is entitled to damages; but I can see there might be difficulty in estimating the real measure of the damages. They might be substantial if the season's crop were good and the prices high, and the reverse of course would be the fact if the crops were poor and the prices low. The plaintiff was paid the sum of $5,450 about the time of the making of the contract, but this left the value of the Saskatchewan lands still outstanding. I think it would be a fair way to compute the interest on this amount, which is alleged to be $9,050, at the legal rate for the time that elapsed between the making of the agreement, namely the 18th of February, 1913, and the time of the registering of the transfer from Mrs. Nicol to the plaintiff. In deference, however, to the opinion of my brother Judges, I consent to a reference to sustain the damages.

I would allow the appeal with costs.

RICHARDS and PERDUE, JJ.A., concurred with CAMERON, J.A.

Appeal allowed.

MANITOBA.

JANUARY 5TH, 1915.

COURT OF APPEAL.

RE PHILLIPPS & WHITLA.

Costs—Solicitor and Client—Taxation—Manitoba Tariff of Fees—Item in Discretion of Taxing Officer—"Fee on Settlement"—Amount Fixed upon Incorrect Principle—Appeal — Reference — Previous Finding Confirmed — Taxing Officer Disregarding Opinion of Court of Appeal —Court of Appeal Itself may Fix Amount—Evidence—Admission of Testimony of Lawyers.

Where a taxing officer upon reference to him by the Court of Appeal to reconsider the amount of an item the fixing of which was in his discretion under the Manitoba Tariff of Fees, disregarded the express opinion of the said court by persisting in acting upon a wrong principle, it was *held*, that the Court of Appeal itself might fix the amount of the said item.

Where the fixing of the amount of an item is in the discretion of the taxing officer, the evidence of members of the legal profession is not admissible as to how that discretion should be exercised.

The items of a solicitor and client bill are governed by the tariff unless there is a legal contract to the effect that the remuneration of the solicitor is to be proportionate to the results achieved.

Judgment of GALT, J., 29 W. L. R. 639, set aside.

An appeal from the judgment of GALT, J., 29 W. L. R. 639, dismissing an appeal from the certificate of G. H. Walker, Esquire, senior taxing officer of the Court, in respect of a fee of $3,500 allowed to Messrs. Phillipps and Whitla, solicitors for the plaintiff, in a taxation between solicitor and client.

R. F. McWilliams, for client, appellant.

A. B. Hudson, for solicitors, respondents.

PERDUE, J.A.:—This is an appeal from the taxing officer in respect of a matter which has already been considered by this court. The facts are fully set out in the report of the previous decision of the case and need not be repeated. See Re Phillipps & Whitla, 23 M. R. 92; 29 W. L. R. 639. By the order of this court made on that appeal the matter was referred back to the taxing officer to re-consider the fee of $3,500 which had been allowed by him on the previous taxation as a fee on settlement. In pronouncing this order the

majority of the court, all of whom gave written expressions of their reasons for judgment, intimated that they considered the fee allowed by the taxing officer to be excessive and not fixed in accordance with the principles of the tariff. Pursuant to this order the taxing officer re-considered the charge in question. He has reported that he has seen no reason to change his mind as to the amount that should be allowed, and he has again allowed the item at $3,500.

In his report the taxing officer refers to R. S. M. 1913, ch. 111, sec. 71, which provides that, "Every barrister shall be entitled to sue for fees due to him." He then goes on to say:—"The barristers could have sued for their services and proven their claim. The item before me, although in a solicitor and client bill of costs has been admitted to be, and has been treated as, a counsel fee all through this reference."

When this matter was before this court on the previous appeal no suggestion was made that it was a counsel fee. In the bill of costs the charge in question, which covers nearly five pages of the appeal book, is headed "Negotiations for settlement." It then sets out a series of interviews with the solicitors for the defendants in the suit of McGibbon v. Oldfield, and enumerates the letters written to the client, the letters received from him and perused and considered, telegrams sent or received and attendances and consultations with different parties. It ends with the words: "Fee on settlement as per negotiations October 18th to November 24th: $8,480.11." A glance at the various services enumerated under the above heading is sufficient to shew that it covers and is intended to cover solicitor's work only. As Mr. Justice Robson pointed out in this case when he gave the solicitors liberty to deliver an itemized bill, the only authority for allowing a fee on settlement is the memorandum on p. 10 of the tariff which says:—

"1. When it is proved that proceedings have been taken by solicitors out of court to expedite proceedings, save costs, or compromise actions, an allowance to be made therefor in the discretion of the taxing officer." See Cameron on Costs, p. 424.

It was under the above authority that the charge was inserted and sought to be taxed. It is sufficient to say that it is not a counsel fee, and that it covers the services of solicitors and not those of counsel. I may add that if the item were regarded as a counsel fee, even a counsel fee, in

the absence of an agreement fixing the amount, must be just, proper and reasonable, all the circumstances being taken into account.

The solicitors have recovered from the defendants the sum of $3,875, which they had in their hands. The taxing officer in his report expresses the opinion that the evidence he took shewed that the client expected that this money would be retained by the solicitors on account, and therefore the client must have thought that their bill would exceed that sum. This does not appear to me to have any bearing upon the question. In the absence of a contract under the statute, the client is not bound by any estimate he may have formed as to the amount his solicitors would demand or be entitled to recover.

The taxing officer received the evidence of three members of the profession, of standing and experience as to what would be a reasonable sum to allow for conducting the settlement. If the item in question were one of common occurrence, such as a matter of simple conveyancing, one as to which there was no prescribed tariff, members of the profession might, I think, be asked what was the usual or customary charge made in such a case: Howard v. Burrows, 7 M. R. 181, 188. But the present charge is made under a provision in the tariff and the taxing officer must exercise his own discretion as to the amount to be allowed. I do not think that evidence of members of the profession was receivable as to how that discretion should be exercised.

The taxing officer has had a very wide experience and his judgment in matters relating to the taxation of costs is entitled to the highest respect, but I think that in the present case he has overlooked the expressed opinion of this court that the allowance of $3,500 was excessive, and that it had been referred back to him in order that the sum to be allowed might be reconsidered and fixed in accordance with the principles of the tariff. With great respect, I think he proceeded upon an erroneous principle and did not properly exercise his discretion when fixing the amount to be allowed as "Fee on settlement."

That this is appealable is beyond question: K. B. Act, Rules 679 and 681; Turnbull v. Janson, 3 C. P. D. 264, 270. It is therefore necessary that this court should now do what in our opinion the taxing officer should have done.

Both in the judgment of Robson, J., and in the judgment of this court it was shewn that, in the absence of a contract under the provision contained in the Law Society Act, there is no authority for fixing the remuneration of a solicitor upon the basis of a commission or percentage on the amount recovered. The charge made in the bill of costs for effecting the settlement was based on a percentage upon the supposed value of the property. The fee taxed has been fixed, wholly I think, upon the basis of the value of the property recovered. The sum allowed is a little less than two and a quarter per cent. on that value. Making the remuneration proportionate to the results achieved may commend itself in many cases as fair between solicitor and client, but there must be a legal contract to that effect; otherwise, the solicitor is bound by the tariff. At the same time I think it right and proper that the magnitude of the interests involved should be given some consideration in arriving at the quantum of the fees to be allowed.

The bill of costs sets out very fully the work performed in effecting the settlement. The negotiations covered a period of about five weeks, but the actual work could not have occupied more than ten days if it had been carried on continuously and not spread, as, no doubt, was necessary, over the longer period. In the previous judgment of this court it was intimated that the taxing officer might, in arriving at the amount to be allowed, be guided by the analogy of the usual allowances for counsel fees in cases of importance. Adopting this method and assuming that ten days time was occupied, I would fix the fee at $1,000. The appeal will be allowed, the order of Galt, J., reversed and the item in question allowed at $1,000, instead of $3,500 allowed by the taxing officer. The Court does not, in the circumstances of this case, make any order as to costs.

CAMERON, J.A.:—I have again read the judgments of Mr. Justice Robson in this case in 22 M. R. 150, and the judgments of the members of this court as reported in 23 M. R. 92. Pursuant to the last named decision the matter again came before the taxing officer who heard further evidence (which was objected to) and taxed to the solicitors the identical amount which had previously been the main subject of appeal. Without reviewing the expressions of opinion in the various judgments referred to, I am unable to come to

the conclusion that the Master has followed them in adhering to the amount formely fixed by him. The Chief Justice considered it "altogether excessive" and held that the Master "should fix it on the principles of the tariff," taking into consideration the amounts already allowed. I cannot rid my mind of the impression that such an amount is altogether outside of the range prescribed by the tariff. The parties here are relegated to their strict legal rights. McGibbon has done nothing to prevent him from taking that position.

I have read the judgment of Mr. Justice Perdue prepared in this matter, and concur in it. At the same time I am bound to state that my own inclination has been to fix a smaller amount, but I do not feel disposed to carry my inclination so far as to differ from the amount there fixed. It is necessary to put an end, at some time or other, to this protracted dispute and I concur in the sum mentioned in Mr. Justice Perdue's judgment.

HAGGART, J.A. (dissenting):—When this matter was before this court some months ago and referred back to the Master, I dissented from that decision and would then have affirmed the Master's finding.

Having practised before Mr. Walker for more than a quarter of a century, and knowing his qualifications as a taxing officer, I would long hesitate before substituting my opinion for his in a matter of this kind, and, with all due respect, I would say the same thing in reference to the judgment of my brother judges. Mr. Walker has long been the arbiter between the lawyers and the public and has always displayed competency and fairness that has gained for him the confidence of the profession and the people.

It was urged that the right of appeal was exhausted and that this court, having remitted this work to the taxing officer, had divested itself of the right to review his findings and could not entertain this appeal. But, on account of the opinion I have formed it is not necessary for me to decide that question.

In addition to the material before the court on the former appeal, we have the opinion of three eminent lawyers of many years' standing, who were representative of the best legal respectability and intelligence, who are the senior members of large legal firms, and all of them are King's Counsel. They all support the finding of the Master. They are as

much interested in upholding the best traditions of the court and the legal profession as are the judges themselves.

You may call this "fee on settlement" a counsel fee, or an honorarium, if you like. It is a remuneration for services; it is pay for work done. The client, Mr. McGibbon, received good value for the amount allowed by the Master.

I would affirm the judgment of Mr. Justice Galt and dismiss this appeal.

RICHARDS, J.A., concurred with CAMERON, and PERDUE, JJ.A.

Appeal allowed; HAGGART, J.A., *dissenting.*

MANITOBA.

JANUARY 5TH, 1915.

COURT OF APPEAL.

HILL v. CARTER HALLS ALDINGER CO.

Master and Servant — Employers' Liability Act, R. S. M. 1913, ch. 61—"Superintendence."

A and B were painters employed by a common employer. They were assisted by two helpers whose duty it was to hold the ladders upon which A and B worked. There was a foreman in charge of the work who visited it at certain times in the day and who had given instruction to A and B not to go on a ladder when on a plank or floor unless there was a man holding it. A and B placed a ladder on a plank and A, having told the person who usually held the ladder that he was not needed, went up the ladder to do some painting which B had told him to do. The ladder slipped, A fell and was injured. A sought to make his employer liable on the ground that he had followed the instructions of B. whom he believed to be temporarily foreman in the absence of the regular foreman. B stated that he had not been appointed foreman by his employer or anyone on his behalf but that he was temporary foreman in the regular foreman's absence, basing this claim upon the ground that he was senior man, i.e., older and more experienced than A.

Held (CAMERON, J.A., dissenting), that there was no evidence to go to the jury of any authority existing in B to act as his employer's foreman.

Garland v. *City of Toronto*, 23 O. A. R. 238, followed; *Shea* v. *English*, 11 O. L. R. 124, distinguished.

An appeal from the verdict of MACDONALD, J., and a jury in favour of plaintiff in an action brought under the Employers' Liability Act, R. S. M. 1913, ch. 61.

The appeal was heard by RICHARDS, PERDUE, CAMERON, and HAGGART, JJ.A.

W. H. Curle, for defendant, appellant.

J. F. Davidson, for plaintiff, respondent.

RICHARDS, J.A:—The plaintiff, a painter in the service of the defendants, was engaged in painting iron braces at some height from the floor in a building part of which the defendants had contracted to paint. There were two painters including the plaintiff, and two painter's helpers; the business of the helpers being to hold the ladders whenever it was necessary for the painters to go upon them to do any part of the work.

One Coulun was acting as workman or helper for the plaintiff, and until a few minutes before the injury complained of, Coulun did hold the ladder upon which the plaintiff worked.

A few minutes before the injury Coulun went away to another part of the work. He says the plaintiff sent him away. The plaintiff denies this. One Calder, the other painter on the work, who was called as a witness for the plaintiff, swore that about five minutes after the accident both Coulun and the plaintiff told him that Coulun, before leaving the plaintiff, had asked him if he needed him any more, and the plaintiff had said no. This again is denied by the plaintiff.

The foreman in charge of the painting, was one Gates, He was also in charge of painting in several other places so that he did not stay all day at the work, but visited it several times each day. Apparently whenever he visited the work he found the ladders being properly held by the painters' helpers. He gave instructions to the plaintiff and Calder not to go on a ladder when on a plank or floor unless there was a man holding the ladder. Calder, the plaintiff's witness, says, "There was a man supposed to hold the ladder all the time. We got strict orders to have a man hold the ladder all the time." Both he and Gates say that the plaintiff was present when these orders were given. The plaintiff denies having heard these orders.

Shortly before 5 o'clock on the day of the accident the plaintiff and Calder placed a plank from one beam to another and upon this placed a ladder, the upper part of which was against the iron work or wall and the lower part placed

astride the plank—that is to say, that the ladder rested with the lowest rung across the plank. The plaintiff went upon this ladder in that condition and without Coulun to help him as already mentioned and while he was working in that position the ladder slipped and he fell and received the injuries for which he now claims damages from his employers.

In the statement of claim as it stood until the trial the injury was claimed to have resulted from obedience by the the plaintiff to the order of Gates, the admitted foreman. At the trial it was admitted that Gates had not ordered the plaintiff to go upon the ladder in question, and in fact had not been present when the plaintiff went upon it. The plaintiff then alleged that Calder, a fellow workman, had told him to place the ladder as he did and go upon it to finish the painting.

Calder admits that Gates was foreman, but in his evidence claims that he was temporarily foreman in Gates' absence. He makes no suggestion that Gates or anyone on behalf of the defendants, placed him in this position, but simply asserts the fact. As nearly as I can make out from his rather vague statements of his position he claimed this because he happened to be the senior man, that is an older and more experienced painter than the plaintiff. He says that he was acting as foreman there and that he instructed the plaintiff to put up the plank and stand the ladder on it. He makes this statement in spite of the fact that he admits they had got orders to have a man hold the ladder all the time when a painter was upon it. In some places he speaks of having told the plaintiff to do this work. In others he puts it differently. For instance, in speaking of the work he says: "I asked him if he would do it, and he said yes. I didn't tell him to do it." He repeated that, in effect, in another place in answer to a question from the judge. Though he purports to have had charge he says that as a matter of fact he and the plaintiff were equal on the work. On being asked the following question he gives the following answer:—

"Q. Did he have to obey your orders? A. We always asked one another before we did anything. We had a little conference before we did anything."

There is no evidence to shew that Gates had any knowledge whatever that his orders with regard to holding the ladder were not being carried out.

I am quite unable to see that there was any evidence whatever to justify a finding that Calder was a person in authority. He got 2½ cents an hour more wages than the plaintiff but he distinctly disclaims having got the difference as foreman or because of any authority, and it is apparent that this difference was because of his being a more experienced workman than the plaintiff.

To my mind the case is practically on all fours with Garland v. City of Toronto, reported in 23 O. A. R. p. 238. It is true that in that case the person whose orders it was said the plaintiff was bound to obey admitted that his only reason for thinking that he was in authority was because he was the senior, the oldest man at the work, or the first man at the work, and that he never considered himself a foreman. In the present case Calder purports to say that he did consider himself a foreman, but what Calder considered or did not consider is quite immaterial; the question turns on what his position was. In the Garland case it was held that the party claimed to be was not a person in authority. That case is rather stronger for the plaintiff than the present, because there the plaintiff and the person claimed to be in authority were doing the one act; that is, an act that it needed the two of them to do. Here the work was that of each individual only. The plaintiff could have done his work without Calder and Calder could have done his without the plaintiff. They were not properly engaged on the same work, but they were engaged in similar work. Each of them alone could have done the work if given sufficient time.

The case of Shea v. English, 11 O. L. R. 124, is wholly distinguishable from the present because there the work in which the plaintiff and the person claimed to be in authority were engaged was such that in order to have the work done at all the plaintiff had to obey the orders of the other person.

I do not think that there was any evidence to go to the jury of an authority existing in Calder, and I do not think that the plaintiff should have been allowed to amend at the trial by striking out the name Gates, leaving the pleading vague enough to cover an allegation that Calder was the person whose authority the plaintiff had to submit to.

With deference, I think there should have been a nonsuit entered in the case. I would allow the appeal with costs and enter a nonsuit in the Court of King's Bench with costs.

PERDUE, J.A.:—At the opening of the trial of this case a discussion as to the form of the action. Counsel for the plaintiff then agreed, as appears by the record, "to proceed under the Workmen's Compensation Act only." It was meant by this that he would confine the case to a claim under what was formerly known as the "Workmen's Compensation for Injuries Act," but which is now called the "Employers' Liability Act," R. S. M. 1913, ch. 61. The defendant was, therefore, not called upon to meet an action at common law. The discussion that took place after the charge had been given to the jury and they had retired shews that the plaintiff rested his case wholly upon the statute.

As the statement of claim was framed in the first instance, and as it appeared on the record entered for trial, the acts of negligence alleged in the erection of the staging and the placing of a ladder thereon to be used by the plaintiff in performing his work, were stated to have been done under the supervision of one Gates, the foreman of the defendant. It was also alleged that the plaintiff worked on the ladder placed in that way by the order and direction of Gates, who had authority over him, and that while so working the ladder fell and the plaintiff sustained the injury. In his evidence the plaintiff stated most positively that Gates was his foreman. He said that Calder, another painter. was working with him on the plank, but in no part of his evidence does he state or suggest that Calder had any superintendence over him, or any right to give him directions or that he had to obey Calder's orders in any respect.

Calder, who was called as a witness for the plaintiff, stated that he was senior and was in charge in Gates' absence, but in cross-examination he corrected this and said he was senior workman. He further stated that the plaintiff and he were equals on the work and, in answer to the question, "Did he (the plaintiff) have to obey your orders?" he answered, "We always asked one another before we done anything, we had a little conference before we done anything." Gates says Calder held the same position as the plaintiff and that Calder had no more authority than the plaintiff. Calder further states that he and the plaintiff had strict orders from Gates, the foreman, to have a man hold the ladder all the time, that no man had to be upon a ladder without a man being there to hold it. He also states that a labourer named Coulun was there to hold the ladder for the

plaintiff and was always available for that purpose. Calder says further that prior to this accident he never saw a ladder used upon the plank without being held by some one.

At the time the accident occurred no one was holding the ladder, the result being that it slipped and the plaintiff fell and received the injuries complained of. The plaintiff's contention is that Calder told the plaintiff to finish a piece of the work which necessitated his going upon the ladder and that Calder sent Coulun away so that he was not on hand to hold the ladder. Calder, the plaintiff's witness, admits that he asked the plaintiff if he would do the work but denies sending Coulun away. Calder further says that immediately after the accident both the plaintiff and Coulun said that the plaintiff had told Coulun that he did not need him any more.

After the charge had been given to the jury the plaintiff's counsel applied for leave to amend the statement of claim by striking out the name of Gates and inserting the word "foreman." This application was granted some time after the trial and the amendment was made accordingly.

The questions left to the jury by the trial judge, with the answers returned, are as follows:—

"(1) Q. Was the accident the result of negligence on the part of the defendant? If your answer is yes, what was the negligence? A. Yes. Accident result of negligence to erect or supply sufficient protection as to platform by defendant.

"(2) Q. Was the plaintiff himself guilty of negligence? and if your answer is yes, what was his negligence? A. No."

The jury assessed the damages at $2,750.

If this had been an action at common law, and tried as such, the above questions would have been proper. As the questions and answers stand there is no finding of the jury upon the all important point, whether Calder was at the time entrusted by the defendant with superintendence over the plaintiff. The answer to the first question is a finding that the accident was due to the failure of the defendant "to erect or supply sufficient protection as to platform." But the plaintiff did not attempt to shew that the accident occurred by reason of an unprotected or unsafe platform. If he could prove such negligence on the part of the defendant he might have an action at common law without invoking the assistance of the statute, but he did not attempt to make

out such a case, but on the contrary, distinctly abandoned it. His complaint came down to this, that Calder was, as he claims, a foreman over him and that Calder told him to do the work by mounting a ladder placed upon the plank or platform and that the labourer who should have been there to hold the ladder had been sent away by Calder. The jury has in fact made no finding upon the main question in dispute, namely,—Was Calder placed in superintendence over the plaintiff and was the plaintiff bound to conform to Calder's orders or directions? Without an answer to that question in the affirmative the plaintiff is not entitled to succeed in a case founded upon the statute. Even if the question were properly submitted to the jury, is there evidence to support a finding upon it favourable to the plaintiff? The plaintiff stated several times in giving his evidence that Gates was his foreman and never suggested that Calder had any superintendence over him. Calder, who gave his evidence in a most uncertain manner, finally declared that the plaintiff and he were equals on the work and that they consulted each other as to the work. The plaintiff put in no evidence except Calder's to prove that the latter was his foreman. I think there was no evidence upon which a jury could find that Calder was entrusted with superintendence over the plaintiff. A nonsuit should therefore be entered with costs.

CAMERON, J.A. (dissenting):—The plaintiff, a painter by trade, was in the employ of the defendant company, a corporation engaged in the business of building and construction. The plaintiff was, on November 11th, 1913, engaged in the work of painting the girders in a garage in the course of construction and was standing on a ladder which stood upon a plank placed on girders or beams running from one side of the building to the other, and about 18 feet from the floor, when the ladder gave way and he was thrown to the ground and received the serious injuries complained of.

The statement of claim alleges that this plank (scaffold or staging) was placed (erected) under the supervision of the defendant's foreman for the purpose for which it was used and that the ladder was placed thereon with like authority.

It is also alleged that the foreman was in charge of the work with authority over the plaintiff, who was working under his orders and directions.

It is further alleged that by reason of a defect in the scaffold and in the manner of placing the ladder thereon, and by reason of the negligence of the foreman in the construction thereof, were in a dangerous condition and unfit to bear the plaintiff's weight, and that, owing to the defect in the scaffold and in the manner of placing the ladder thereon, and owing to the negligence of the defendant company and its foreman, the ladder fell and the plaintiff thereby sustained injury.

The wording of the statement of claim is sufficiently wide to cover an action at common law as well as under the Employers' Liability Act. At the trial counsel for the plaintiff restricted his claim to proceedings under the statute. The real cause of the accident was that the ladder on which the plaintiff had to stand to do his work, was not held in position or otherwise made secure.

In the original statement of claim the name of the foreman was given as that of Gates. Gates was there on the first day the ladder was put up. There were then present Gates, Calder and the plaintiff. On the third day, when the plaintiff fell, Gates was not near. The plaintiff said that Gates never told him always to have the ladder held. Coulun (a fellow workman) did hold the ladder, however, sometimes. The following questions and answers appear:—

"Q. Did you tell Coulun just before the accident that he need not hold the ladder any more? A. Yes, because we finished that part. And Mr. Calder he told me 'You move your ladders on this part, and do this and finish it,' and Mike wasn't around that time.

"Q. Did you tell Mike that he could go and not hold the ladder any more? A. No. I didn't tell him anything that he can go."

Calder says the scaffolding and ladder were put up when he was present, with the plaintiff, Mike Coulun and another. Gates, he says, was foreman, "but when he was away I was senior." He was, he says, in charge when Gates was not there. He thought first of using a 40 foot ladder, but the four of them thought a plank and short ladder would be satisfactory. He (Calder) was acting as foreman and instructed and helped the men to put up the plank and the ladder upon it. He says, "there was a man supposed to hold the ladder all the time. We got strict orders to have a man hold the ladder all the time." Gates gave these orders,

Calder says, to all four, but the plaintiff says he did not hear them. Coulun was supposed to be holding the ladder for Hill, Calder says. That was Coulun's employment and if he wasn't holding the ladder he was painting. At the time of the accident he was not doing anything. Calder was working on the same girder with the plaintiff. There was a "short space" left to paint, and Calder, telling the plaintiff to do it, went away. "I asked him if he would do it and he said yes. I didn't tell him to do it." It was Calder who instructed Coulun to go over to another part of the garage and finish some work there.

Calder was paid at the rate of 42½ cents per hour, while the plaintiff received 40 cents.

Calder says that he never saw the ladder being used without being held prior to the accident. He reiterates that he was in charge in Gates' absence:—

"Q. And you had charge? A. Yes.

"Q. But as a matter of fact, you and Hill were equal on the work? A. Oh, yes.

"Q. Did he have to obey your orders? A, We always asked one another before we did anything. We had a little conference before we did anything."

Gates stated positively that he told the plaintiff as well as Calder not to go on a ladder when it was on a plank or a floor unless there was a man holding it.—"The ladder must be held when there is anyone working on it." He denies that Calder was a foreman, or that he ever left him in charge. Calder, he says, had no more authority than Hill, and he never gave him instructions as sub-foreman, and if he did take charge when he (Gates) was not there, it was not through his instructions.

Coulun in his evidence says he was not holding the ladder at the time of the accident, because the plaintiff had sent him away.

The plaintiff, when recalled, denied that Coulun was present when Calder gave him instructions to finish the "short piece." He says he never sent Coulun away.

An order was made subsequently, before judgment was entered on the verdict, striking Gates' name out of the statement of claim, leaving the allegation as to the foreman in general form.

There is no doubt that to the knowledge of the defendant, the platform or plank on which the ladder stood on which

the plaintiff worked was dangerous unless there was a man holding the ladder.

The case was tried before Mr. Justice Macdonald and a jury, who rendered a verdict for the plaintiff for $2,750. In answer to questions the jury affirmatively found negligence on the part of the defendant and denied negligence on the part of the plaintiff.

The principal question argued before us was on the application to this case of sub-secs. (b) and (c) of sec. 3 of the Employers' Liability Act. It was contended that Calder was not, on the evidence, a person in the defendant's employment who had any superintendence entrusted to him. Superintendence is defined by sub-sec. (a) of sec. 2. In support of this contention we were referred to Garland v. Toronto, 23 A. R. 238, in which it was held that no implied right of superintendence within the Act arose merely from length of service or superior skill and that where one workman, presuming on greater length of service or greater skill, directs a fellowworkman to do certain work in an unsafe manner and injury results, the employer is not liable. The evidence on the point is stated in Chief Justice Hagarty's judgment at p. 241. The facts of this case are distinguishable as here Calder called himself foreman. When cross-examined as to this he said in answer to the question:—

"Q. Senior foreman? Senior workman you mean? A. Yes, that is, after Mr. Gates was gone it was left to me. Evidently he was under the impression that, by tacit understanding, or otherwise, in Gates' absence he was in charge. It also appears that Amory (the fellow workman in the Garland case) and the plaintiff in that case were labourers of the same grade, which is not the case here."

The above case was considered in Shea v. Inglish, 11 O. L. R. 124, where the plaintiff, a lad of 18, was engaged with two men in riveting the plates of a boiler. It was the duty of one of the three to heat the rivets, of the second to place them in position, and of the third to fasten them by a hydraulic hammer which he controlled. This last man directed the plaintiff to go inside the boiler and hold back a loose stay coming in the way of the rivets, and while doing this the plaintiff was injured. It was held that the man controlling the hammer was in effect necessarily entrusted with the superintendence of the whole operation, that to his orders the plaintiff was bound to conform and that the accident hav-

ing happened, as was found, owing to this man's negligence, the plaintiff was entitled to recover. Mr. Justice Anglin distinguishes Garland v. Toronto and Ferguson v. Galt School Board, 27 A. R. 480. (to which we were also referred by counsel for the defendant in this case). Mr. Justice Anglin in effect holds that the nature of the particular work and the circumstances surrounding it, can create the statutory condition of superintendence or supervision without any express authority. He finds authority for this in Wild v. Waygood, [1892] 1 Q. B. 783. There the plaintiff was a workman in the employ of a firm of builders, building a house. The defendants had the contract to put a lift in this house and set one Delmea, one of their workmen, to do the work. He applied for one of the builders' workmen to help him and the plaintiff was selected. In the course of the work Delmea told the plaintiff to put a plank across the well of the lift and stand on it, and while he was so standing Delmea started the lift and the plaintiff was injured. Lord Herschell held (p. 788), that there was evidence to shew that Delmea was a person to whose orders the plaintiff was bound to conform. On the facts set forth by Lord Herschell, some of which are not unlike those present here, he held that there was evidence that Delmea was such a person. Here it is a reasonable contention that, in Gates' absence, if and when the necessity for direction arose, that direction would naturally and by force of circumstances go to Calder, the workman apparently best qualified of the three (Hill, Coulun and himself) to exercise it.

There is evidence that Calder ordered the plaintiff to do what he did. "And Mr. Calder he told me, 'You move your ladders on this part and do this and finish it.'" Calder specifically says he was in charge "a kind of painter foreman." When Mr. Gates was away "I was senior." And again in his evidence he says he was acting as foreman. He somewhat modifies his statement that he told Hill to do "a short piece at the top" of one of the girders just before the accident. He says, "I asked if he would do it and he said yes. I didn't tell him to do it." Though in form a request this could fairly be taken as equivalent to an order, and was apparently as such accepted by the plaintiff. Calder sent Coulun to another part of the garage to finish a small corner of the beam. So that there was evidence of Calder's giving orders not only to the plaintiff but to Coulun as well. Calder

says, "I asked Coulun if Mr. Hill was finished with him and he said 'Yes,' and he would do it himself."

"Q. When you sent Coulun to that other part of the building then, Hill had already dismissed him." . . . . "Q. But when you sent Coulun to do the other work he was not then holding Hill's ladder was he? A. No." Against this is the evidence of Gates, already referred to, who denied that Calder was a foreman or that he had any authority more than the plaintiff himself had.

The position, it seems to me, is that there was some evidence, which the trial judge brought to the attention of the jury, that pointed to the conclusion that Calder was, in the position of a foreman in Gates' absence, to whose orders the plaintiff was bound to conform when he asked him to finish the painting. I do not see how the learned judge could, on the evidence, have withdrawn that matter wholly from the consideration of the jury, who were entitled to disregard Gates' contradiction if they chose to do so. And it is to be assumed, in view of the judge's charge, that in finding the defendants guilty of negligence they found as a fact that Calder was in charge. There is evidence to support such a finding and this court is not, in my judgment, justified in reversing it.

Now, Gates' position as foreman in charge is not disputed and when the plaintiff was recalled, he denied that Gates had ever told him that he was not to go upon the ladder without some one holding it. This the jury, no doubt, c-cepted, as they negatived contributory negligence on the part of the plaintiff. All this was put explicitly before the jury by the trial judge in his charge. The jury felt and expressed the opinion that sufficient precautions had not been taken to secure the plaintiff's safety when he was working in a dangerous position. They may have attributed the accident not only to Calder's order to the plaintiff but to Gates' neglect to put the plaintiff on his guard, or to supply a stable platform to work on. The fact that the plaintiff is a foreigner, imperfectly acquainted with the English language, accentuated the necessity for greater care with regard to his safety.

The damages were assessed in compliance with the provisions of the Act. The questions submitted by the trial judge to the jury "by the wish of counsel for both parties" are, in form and substance, more applicable to an action at common

law than under the statute. Mr. Carter admits that the platform upon which the plaintiff worked was dangerous unless the ladder was held. It is arguable that though plaintiff's counsel stated he was not proceeding at common law, yet that this admission went to the question of damages only and does not exclude his right to recover at common law, if that right is sufficiently established on the pleadings, evidence and the findings of the jury.

The duty is imposed on every employer by common law to use ordinary care and diligence to provide sound and safe materials and appliances for his workmen, and a safe place to work in. "A master is responsible in point of law, not only for a defect on his part in providing good and sufficient apparatus but also for his failure to see that the apparatus is properly used." Per Lord Watson in Smith v. Baker, [1891] A. C. 353. It is well established doctrine that the workmen must be provided by the employer with a reasonably safe place in which to work and that duty cannot be got rid of by delegating it to others. I refer to the judgment of the Chief Justice of this court in Wappler v. C. N. R., 23 M. R. at p. 671, also to Ainslee v. McDougall, 42 S. C. R. Brooks v. Fakkema, 44 S. C. R. 412, and Lafvendal v. Northern Foundry Co., 22 M. R. 207.

Some objections were taken to the judge's charge: but, read as a whole, I cannot see how it could have conveyed to the jury any erroneous impression or unduly influenced them against the defendant. I would not disturb the judgment and would dismiss the appeal.

HAGGART, J.A., concurred with RICHARDS and PERDUE, JJ.A.

Appeal allowed; CAMERON, J.A., *dissenting.*

MANITOBA.

THE MASTER. DECEMBER 23RD, 1914.

ANDERSON v. FORRESTER.

Negligence — Personal Injuries — Damages — Principle of Computation.

In fixing the amount of compensation for injuries resulting from negligence, the plaintiff should be allowed a fair amount for being deprived of the reasonable prospects of improving his condition in life and, accordingly, the fact that the plaintiff might have been receiving larger wages if he had not been injured should be taken into consideration.

In ascertaining the proper amount of compensation for injuries caused by negligence, the jury should not give punitive or vindicative damages or a perfect compensation for the pecuniary injury but should give a fair compensation, under the circumstances, for plaintiff's loss, taking into account the accidents of life and other matters, and the fact that the plaintiff has not been completely disabled, if such be the case.

***Schwartz* v. *Winnipeg Electric Ry. Co.*, 24 W. L. R. 5, applied.**

Hugh Phillips, for plaintiff.

G. A. Elliott, K.C., for defendant.

THE MASTER:—The defendants in this case were held liable for the injury suffered by the plaintiff when the defendants' building fell upon the blacksmith shop in which the plaintiff was working, causing portions of the structure to fall upon him, pinning him down to the floor. The plaintiff, who impressed me as a credible witness, stated that he remained under the debris of the fallen building for a period of about twenty minutes, when he succeeded in extricating himself from underneath the timbers that had fallen upon him, and walked unassisted across the street to an hotel where he received medical assistance. He was taken to his home and was there confined to his bed for three or four weeks, during which he was attended by Dr. Pophan. After this he apparently recovered sufficiently to walk about, though the evidence does not shew how soon after the accident he was able to resume his work as a blacksmith.

I am satisfied from all the evidence, including the plaintiff's own evidence and the evidence of the physicians who were called as witnesses, and the exhibits put in, consisting of X-Ray pictures of the lower portion of the plaintiff's spine,

that that portion of his spine was permanently injured as a result of the accident. Some of the vertebrae are, I am satisfied, out of true alignment, and there is an abnormal bony growth between the fourth and fifth lumber vertebrae caused, I believe, by the injury referred to. I am also satisfied that the plaintiff has suffered, and still suffers, a certain amount of disability in doing his ordinary work as a blacksmith, and that such disability will remain for the rest of his life. He states that if he gets on his knee to shoe a horse, and presses any weight on himself, he is not able to straighten himself up quickly and that if he has a heavy day's work and comes home and sits down and then gets up he cannot straighten himself up again for a while; that before the injury he never had a sore back, although he has been often tired; that he cannot handle heavy jobs as he used to do, and cannot work steady at horse shoeing in the same way that he could before. He is now in the employment of the city of Winnipeg in a blacksmith shop, and although he is engaged there in horseshoeing, he does not do the whole work, but does the fitting of the shoes for the horses.

He says that if he happens to get a cold in his back it ties him right up and that before the accident he believes his back was in first-class condition. He was 32 years of age at the time of the accident, in March, 1910. He says that whilst he can do general blacksmithing work to a certain extent, he cannot take it up as he did before, because he cannot stand the stooping, and he cannot handle the same weights as he could before.

He admits candidly that he does not always suffer from pain in his back, but only sometimes—if he has had a heavy day's work or "anything like that." He states that he had an offer of $5 per day to go to Edmonton to be foreman of a blacksmith shop, or a horse-shoeing shop, but that he felt that he was not competent to handle the work and had to refuse it. On cross-examination, in answer to the question, "So that you have nothing to complain of so far as inconvenience goes in the discharging of your duties?" he answered, "Not to say for the past year, not particularly." But I do not think that he should be precluded by this fact from recovering reasonable damages, as the probabilitities are that he receives a measure of consideration from his present employers, and has not been required to do such work as would cause him to suffer pain.

No evidence was given to shew how the plaintiff was employed between the date of the accident and the 10th of April, 1911, when he started work for the city of Winnipeg, but since then his wages have been gradually increasing so that at the time of the giving of his evidence before me, he was in receipt of 40 cents per hour from the city. . During the period from April 10th, 1911, until the hearing before me he was absent from the city's employment for a good many days intermittently, and the cause of such absences was not shewn; but it may have been that the plaintiff was at those times suffering from a cold in his back which he said tied him right up whenever he had one.

Although the plaintiff's present earnings are not less but more per hour than he was receiving at the time of the accident yet I am satisfied from his evidence that if he had not been injured he might now be in receipt of larger wages than he is getting, and that he should be allowed a fair amount of compensation for being deprived of the reasonable prospects he had of improving his condition in life.

It appears from the evidence that he incurred doctor's bills, amounting to $82, and I suppose it must have cost him something in addition for medicine and nursing.

As I understand it, my position in this investigation is analogous to that of a jury in ascertaining the proper amount of compensation for such an injury caused by the negligence of the defendant. There should not be any punitive or vindictive damages, but I should follow the rule laid down in Schwartz v. Winnipeg Electric Railway Co., 23 M. R. 483, 24 W. L. R. 5, and take into account the accidents of life and other matters, and that the plaintiff has not been completely disabled. I should not give the plaintiff the full amount of a perfect compensation for the pecuniary injury he has suffered but only what I consider, under the circumstances, a fair compensation for his loss. It is a difficult task to perform in the circumstances of this case, but on my finding of the facts, I think that the plaintiff should be awarded the sum of $1,600.

MANITOBA.

GALT, J. JANUARY 2ND, 1915.

SLOBODIAN v. HARRIS.

Moratorium—Judgment Registered after 31st July, 1914—Contract within Meaning of sec. 6 of Moratorium Act—County Courts Act, secs. 215 and 216.

A judgment registered after the 31st of July, 1914, becomes, by virtue of secs. 215 and 216 of the County Courts Act, a contract within the meaning of sec. 6 of the Moratorium Act, providing, *inter alia*, that nothing in the Act should apply to proceedings or rights of parties under any contract made or entered into after the 31st day of July, 1914.

An application by the plaintiff for liberty to sell certain lands, or a competent part thereof to realize the amount payable under a judgment recovered on the 24th June, 1914, against the defendants Mike Harris and Mike Makoski in an action in the County Court.

GALT, J.:—The affidavit in support of the motion is made by a student in the office of the plaintiff's solicitor and shews that judgment was entered in the County Court by the plaintiff on the above date for $233.45, and neither the said sum nor any part thereof has been paid; that on the 17th day of November, 1914, execution was issued out of the County Court which has been returned nulla bona; and that on the 17th November, 1914, a certificate of the said judgment was registered in the Land Titles Office at the city of Winnipeg against the lands of the defendant Mike Makoski. The deponent further says that said Mike Makoski is the registered owner in fee simple of certain lands in the Winnipeg Land Titles Office, describing the same.

No one appeared for the defendants.

Under the provisions of the County Courts Act, secs. 215 and 216, and the King's Bench Act, rules 741 and 742, the plaintiff is entitled to the relief which he seeks, unless the Moratorium Act prevents it.

In the case of Ledoux v. Cameron, recently before me on appeal, the Master had refused to settle a certain advertisement for sale under a County Court judgment registered in the Land Titles Office shortly before the Moratorium Act

was passed, by reason of sec. 2 of the Act. In that case I held, affirming the Master's decision, that a registered judgment was an instrument charging land with the payment of money within the meaning of sec. 2 of the said Act, and no proceedings for sale could be taken until after the lapse of six months from August 1st, 1914.

In the present case the certificate of judgment was not registered until the 17th day of November, 1914.

Under sec. 6 of the Moratorium Act "Nothing in this Act shall apply to proceedings or the rights of the parties under any mortgage, agreement of sale, or other contract made or entered into after the 31st day of July, 1914."

Can it be said that a registered judgment is a "contract"?

Under secs. 215 and 216 of the County Courts Act a registered judgment binds and forms a lien and charge on all the lands of the judgment debtor the same as though charged in writing by the judgment debtor under his hand and seal, with the amount of the judgment.

In my opinion a registered judgment, under the provisions just mentioned, becomes a contract, and the case thus falls within the exception provided for in sec. 6 of the Moratorium Act. The plaintiff, therefore, is entitled to the relief he claims, together with the costs of this motion.

ALBERTA.

CURRAN, J. JANUARY 11TH, 1915.

RONALD v. LILLARD.

Moratorium—Sec. 2 of Act—Construction—Inapplicable to Vendor's Lien for whole of Purchase Money upon which Nothing has been Paid—Abandonment of Land by Purchaser—Effect—Sec. 7 of Act—Vendor and Purchaser—Proviso that Vendor upon Default of Purchaser Might Determine Agreement of Sale by Notice—By whom Right to give Notice Exercisable.

A sold lots 10 and 11 to B, an agreement of sale being executed and delivered. B assigned the agreement to C, and the land therein mentioned was conveyed by B to C. C assigned to D his rights under the said agreement and assignment and conveyed his interest in lot 11 only in consideration of a cash payment, and the assumption by D of the balance owing to A in respect of the original purchase. D was let into possession but never paid anything in respect of the sums which ought to have been paid by him. The agreement between A and B contained the usual proviso that the vendor upon

default might determine the agreement by a 30-day notice. *Held*, that notice given by C to D had no legal effect upon D's rights as a purchaser or in any other respect, such a notice amounting to nothing more than a demand for payment of a debt.

Sec. 2 of the Moratorium Act prohibits proceedings for the sale of land under any power of sale contained in any mortgage of land, agreement to purchase land, or in any other instrument charging land with the payment of money or *otherwise existing* for default in payment, etc. *Held*, that the words "or otherwise existing" meant, at all events, that the power of sale so otherwise existing must be a power existing under some authority before the proceedings are taken, and that it does not include the exercise of the power of the court to enforce by sale of land an equitable right conferred by law. Therefore, a vendor's lien for the whole of the purchase price upon which nothing has been paid is not interfered with by the Act and must be given effect to in the usual way.

A. Monkman and C. G. Barnardo, for plaintiff.

P. C. Locke, for defendant.

CURRAN, J.:—The facts of this case are not disputed. In fact the only questions between the parties are as to the legal effect of the notice given by the plaintiff to the defendant, and as to whether or not the Moratorium Act applies.

The notice intimates to the defendant that if payment of the money demanded by it is not made within 14 days from the date of service, the plaintiff will proceed without any consent or concurrence on the part of the defendant, and without any further notice to him, to enter into possession and receive and take the proceeds of the lands mentioned and to sell and absolutely dispose of the land, either by public auction or private sale, etc., as the plaintiff may deem proper, and to convey and assure the same to any purchaser. This notice is dated the 20th August, 1914, is signed by the plaintiff in person and was duly served upon the defendant.

It appeared that the land in question—lot 11, in block 4, Plan 2038 of the Winnipeg Land Titles Office—originally belonged to Seven Oaks Land Company, by whom it was sold to one Emil A. Schwab, together with the adjoining lot 10. An agreement to Schwab from this company was duly executed and delivered. This agreement was, on the 5th of June, 1914, duly assigned to the plaintiff and the land therein mentioned conveyed by the assignor Schwab to the plaintiff. By the assignment, dated 17th July, 1914, the plaintiff assigned to the defendant his rights under the foregoing agreement and assigned and conveyed to him his interest in lot 11 only in consideration of the sum of $737.11

to be paid in cash and the assumption by the defendant of $810, the moneys owing to the Seven Oaks Land Company in respect of the original purchase. This assignment was duly executed and delivered by the plaintiff and defendant, but the consideration $737.11 was not then paid by the defendant and has not since been paid.

The defendant was let into possession and thereafter proceeded to erect a building on the said lot, which is, however, uncompleted.

The defendant covenanted with the plaintiff to assume and pay the sum of $810 to the Seven Oaks Land Company, and to indemnify the plaintiff therefrom; he has not paid this sum either and so is altogether in default in respect to the matters which ought to have been performed by him.

The agreement from the Seven Oaks Land Company contained the usual proviso that the vendor upon default might determine the agreement by a 30-day notice. No such right or privilege is reserved to the plaintiff, so that the notice in question given by the plaintiff to the defendant had no legal force or effect upon the defendant's rights as a purchaser or in any other respect. Such notice could amount to nothing more than any other form of demand for payment of a debt due.

The plaintiff has no extra-judicial contract right upon defendant's default to terminate the sale or to enter into possession of the premises. This could only be accomplished by resort to the Courts.

As admittedly the matters arising under this notice are the only ones apart from the effect of the Moratorium Act in dispute, I hold that the defence fails, and that the plaintiff is entitled to succeed unless the action is one which is prohibited from being brought at this time by this Act.

It is contended by the defendant that the Moratorium Act applies and that no proceedings for the sale of this land can now be taken. The plaintiff contends that this Act does not apply, as a sale for cash of the land was contemplated and the status was never intended to apply to cases where a purchaser gets a conveyance without paying over the consideration, and that, in any event, as the defendant admits abandonment of the land, the Act does not apply, vide, sec. 7.

The assignment of agreement is absolute in form and contains no power of sale whatever. The recitals in it are really merely explanatory of certain previous dealings with

the land by which the plaintiff acquired a title. The covenant on the defendant's part to pay the Seven Oaks Land Company $810 and interest is the only inchoate provision of the assignment. It seems to me the effect of the assignment is just as if the plaintiff had given the defendant a quit claim deed of his equity of redemption in the land in which deed there had been inserted a covenant by the defendant, as grantee, to indemnify the grantor against an incumbrance upon the land for which the grantor was personally liable.

The right to a vendor's lien for unpaid purchase money does not depend upon any provision in a deed or other instrument, but upon an implied contract on the part of the purchaser to pay the vendor the purchase money agreed upon. Here there is no denial by the defendant of the plaintiff's asserted right to a lien; in fact the defendant admits this by his pleading. A vendor's implied lien for purchase money of land is of a purely equitable nature and has no existence until established by a decree of a Court in a particular case. An equitable lien may be defined as an equitable right conferred by law upon one man to a charge upon the real or personal property of another until certain specific claims have been satisfied. It differs from an equitable charge inasmuch as the latter is a right founded on contract, whereas an equitable lien is founded on the principle of equity that he who has obtained possession of property under a contract for payment of its value will not be allowed to keep it without payment. Halsbury, Vol. 19, p. 14. Again, by the same author, a vendor's lien upon real estate is enforceable by sale, but not until it has been established by a judgment of the court binding the persons affected by the lien. Again, the vendor has the alternative right to rescind the contract and recover possession of the land; but he cannot enforce it by foreclosure. Halsbury, Vol. 19, p. 27.

Section 2 of the Moratorium Act prohibits proceedings for the sale of any land under any power of sale contained in any mortgage of land, agreement to purchase land, or in any other instrument charging land with the payment of money or otherwise existing for default in payment, etc. What do the words "or otherwise existing" mean? I think they mean this, at all events, that the power of sale so otherwise existing must be a power existing under some authority before the proceedings are taken, and that it does not include

the exercise of the power of the court to enforce by sale of land an equitable right conferred by law.

The Act interferes with contract rights and is in derogation of such rights. Its scope ought not to be extended beyond what the wording of the statute makes perfectly clear. Unusual financial conditions attributed mainly to the war in which our country in common with the Motherland is now engaged was the reason for the passing of such drastic legislation. Its object seems to have been to protect men against losing their land upon which they had given mortgages or which they had acquired by purchase upon terms of credit and were unable to pay for in consequence of temporary financial inability brought about by war conditions. Could it be said that such a case as the one under consideration, where the defendant has paid nothing at all, was in contemplation or was intended to be protected by this Act? I do not think so. It is true there is only one exception in sec. 2 from the inhibition, namely, liens under The Mechanics' and Wage Earners' Lien Act. Such liens were expressly created by statute for the protection of certain classes of persons. Why this exception was deemed necessary in the Act I do not know, unless the words "or otherwise existing" were inserted with the intention of extending the operation of the Act to every description of lien, however arising, created or declared, and hence to mechanics' liens also. If this be so then, doubtless, the Act does prevent the enforcement of a vendor's lien for unpaid purchase money. I do not hold this view or so construe the Act, and I think that the enforcement of a vendor's lien arising as in this case for the whole of the purchase price, nothing whatever having been paid, is not interfered with by the Act, and must be given effect to in the usual way.

I do not wish to be taken as holding that this would be the result where part of the purchase price had actually been paid by a defendant, but I merely lay down the proposition that in the present case, where nothing at all has been paid, the Act should not and does not apply to prevent the plaintiff from obtaining redress.

Again, under sec. 7, where there has been an abandonment of the land by the purchaser, the Act does not apply. Abandonment has not been alleged by the plaintiff in his statement of claim, but the contrary, for he asserts that the defendant is still in possession. Doubtless the plaintiff

thought that the defendant was in possession when he issued his statement of claim. However, the defendant in clause 3 of his statement of defence alleges that the plaintiff cancelled the agreement, retook possession of the land and thereafter dealt with it as his own. Upon this admission I think I am quite justified in holding that there has been an abandonment, and on this ground exclude the operation of the statute. The plaintiff also asks for a declaration that his lien extends to the sum of $810 and interest which the defendant covenanted to pay the Seven Oaks Land Company but did not pay when due and has not since paid. The liability of the defendant upon this covenant is not disputed. In fact the defendant expressly admits it, and also his default. This $810 is principal money payable under the Schwab agreement to the Seven Oaks Land Company, but so far as the transaction between the plaintiff and the defendant is concerned, it really formed part of the consideration for the sale. The right of lien undoubtedly extends to this sum also, and I so hold. As to the wage item there was only a matter of $10 in dispute and the plaintiff is entitled to judgment against the defendant for $42.90 in this respect.

There will be judgment, therefore, declaring the plaintiff entitled to a vendor's lien on the land in question for the respective sums of $737.11 and interest and $810 and interest as before stated, and in default of payment within six months of these sums, to a sale of the land under the direction of this Court, to realize these amounts, and to judgment for any deficiency arising upon such sale in respect of the said sum of $737.11 and interest only and the costs of suit. As the plaintiff admits he has not paid the sum of $810 and interest due the Seven Oaks Land Company, he will not be entitled to have this sum taken into account in computing any possible deficiency arising upon a sale.

In the alternative, if the plaintiff desires, he may have judgment rescinding the sale and if necessary for possession of the land.

There will also be personal judgment for the plaintiff against the defendant for the sums of $737.11 with interest from the date of Exhibit 2, and for $42.90, the amount of wages due the plaintiff. The plaintiff is of course entitled to his costs of suit.

ALBERTA.

JANUARY 26TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

REX. v. McCLAIN.

Criminal Law—Depositions—Trivial Defects in Form of—Charge Preferred by Attorney-General under sec. 873A of Code—Evidence—Admissibility—Presumption arising from Recent Possession of Stolen Property—Direct Evidence of the Theft—Evidence of Accomplice before Sentence against Principal Offender — Witness not Called at Preliminary Hearing and whose Name not Endorsed upon Charge — When Competent to give Evidence at Trial.

Where there were some slight defects in the form in which a magistrate had returned depositions to the proper court, it was *held*, that the said defects could not be set up as a ground for quashing a charge preferred by an agent of the Attorney-General under sec. 873A of the Criminal Code.

The application of the presumption arising out of recent possession of stolen property is not excluded by the existence of direct evidence.

A confessed accomplice upon whom sentence has not been passed may be called as a witness, if otherwise competent, against the principal offender.

An agent of the Attorney-General who prefers a charge under sec. 873A may call witnesses at the trial on behalf of the Crown who were not called at the preliminary hearing and whose names were not endorsed upon the charge.

Case reserved for the opinion of the Appellate Division by McCARTHY, J.

James Short, K.C., for the Crown.

F. W. Griffiths, for the accused.

The court consisted of STUART, SCOTT, BECK, and WALSH, JJ.

STUART, J.:—The accused was charged jointly with one Mathews, with the offence of having stolen a horse and mare, the property of one Brink, on July 1st, 1914. The charge was in the usual form and was signed by James Short as agent of the Attorney-General.

When the charge was read to the accused McClain pleaded not guilty and Mathews pleaded guilty. The learned trial

judge reserved sentence upon Mathews. Afterwards, but before sentence was passed upon Mathews, the trial of McClain was proceeded with and he elected to be tried without a jury.

The trial judge convicted McClain. The chief evidence against him was that of his accomplice Mathews who had pleaded guilty but was awaiting sentence.

At the opening of the trial counsel for McClain applied to quash the charge or indictment on the ground that there were no proper depositions as required by sec. 682 of the Code. This objection was reserved but ultimately overruled by the trial judge. When Mathews was called to give evidence on behalf of the Crown, and before he was sworn, the following discussion took place:—

"Mr. Griffiths: I wish to invite your Lordship's attention to the fact that the next witness Mathews has pleaded guilty to this same charge but has not yet been sentenced. For this reason I wish to raise objection to the receipt of the evidence of Mathews until after he has been sentenced."

(Point argued by both Mr. Griffiths and Mr. Short.)

The Court: "In view of these authorities Mr. Short do you still tender the evidence of the witness Mathews?"

Mr. Short: "Yes, my lord."

The Court: "Well, the responsibility is upon you. I will admit the evidence subject to Mr. Griffiths' objection."

Mathews then gave evidence and other evidence was adduced by the Crown which was intended to corroborate the story of Mathews.

At the close of the prosecution counsel for the accused renewed his former objections which were all overruled. In reference to the testimony of Mathews the learned trial judge said:—"The cases cited by counsel for the accused I find do not determine the point. Cockburn, C.J., determined it was a very bad practice this holding out an inducement to the witness to give evidence in favour of the Crown in the anticipation that the Crown would be lenient with him when moving for sentence in his case. Had there been a jury in this case I would have been inclined to sustain the objection, but as there is no jury and as the cases cited by the counsel for the accused do not decide this, I take it upon myself to permit that evidence to go in, exercising my own judgment as to what weight I should give to the evidence of Mathews under the circumstances."

Evidence for the defence was then given and the accused was convicted and sentenced to three years in the penitentiary.

Upon the application of counsel for the accused the learned trial judge reserved a case for the opinion of this court upon the following questions:—

"1. Should the indictment or charge have been quashed?

"2. Does the evidence disclose sufficient corroboration of the evidence of Mathews?

"3. Can the presumption arising out of recent possession of stolen property have any bearing on the case when the Crown attempted to make out its case by direct evidence?

"4. Was I right in so remanding Mathews for sentence and permitting him to testify against McClain before imposing sentence.

"5. Was I right in permitting the Crown to call witnesses who were not called at the preliminary hearing or whose names were not endorsed upon the charge?

"6. Upon the above grounds or any of them should the conviction be quashed?"

I think the first question should be answered in the negative. In the case reserved it is stated that "it was admitted by the Crown prosecutor that the charge was not ordered by a judge or agent of the Attorney-General and that objection to the same was taken before election or plea." In view of the undoubted fact that Mr. Short did in fact sign a charge in the usual way a copy of which is in the case submitted and the actual original of which was shewn to us as part of the documents on file, there can be no doubt that there was some misapprehension when the case was prepared with the statement of admission above cited inserted in it. It is clear that what was intended was that there was no order of a judge directing the charge to be laid and no special direction or order by the Attorney-General.

The contention made by counsel for the accused was that owing to certain alleged defects in the depositions taken upon the preliminary enquiry the case should be treated upon the footing that there were no depositions and no preliminary enquiry at all and that therefore in the absence of such a proper preliminary hearing the agent of the Attorney-General had no power under sec. 873A of the Criminal Code to prefer any charge against the accused. If the premises of the learned counsel were correct it would be necessary for

us to consider one of the questions raised in the cases In re Criminal Code, 16 Can. C. C. 459, and in Rex v. Duff (No. 2), 15 C. C. C. 454. In my opinion, however, it is not necessary to consider that important question because it seems clear that there was a proper preliminary enquiry and proper depositions. The only criticism made of the form in which the depositions appear was that there did not appear any separate caption to the page upon which the evidence commenced. There is first a document headed "Statement of the accused" which sets forth the charge against the accused, the date of the hearing, the fact that the charge was read to the accused, that the statutory warning was given, and that the accused made no statement. This document is signed by the Justice of the Peace and then follows, physically attached to the first document by a pin, six pages of foolscap upon which what purports to be the evidence of the witness called is written down in pen and ink and each page purports to be signed by the witness and by the same Justice of the Peace who signed the first document. A perusal of this evidence shews that the witnesses were referring to the charge referred to in the first document.

There is also before us the information and complaint not attached to the other documents but plainly referring to the same charge. It is true there is no record of the committal for trial but in my opinion there is sufficient to shew that the accused did in fact have the advantage of a preliminary enquiry. Inasmuch, therefore, as it is only upon the ground that an agent of the Attorney-General cannot prefer a charge without there having been a preliminary enquiry that the contention is made that the charge should have been quashed, I do not think that some slight defects in the form in which the magistrate returned the depositions to the proper court can be taken advantage of to uphold such an argument.

With regard to the second question I am of opinion that it does not raise any point of law at all and that no question is properly reserved for our opinion. This court has already decided in Rex v. Bechtel that a jury not only may, but ought to, be told that, while they ought not to convict on the uncorroborated testimony of an accomplice, they are strictly in law at liberty to do so if they see fit. Where corroborative evidence is required by the Code it is the duty of the trial judge to instruct the jury as to what part of the

evidence, if any, bears that character, and if he mis-instructs them, there is no doubt the matter can be reviewed on a reserved case. And so also where there is no jury, if the judge has obviously treated as corroborative evidence something which is not such within the meaning of the Code it would probably be fatal to the conviction. But in the present instance corroborative evidence was not strictly necessary at all. The learned trial judge indicated when convicting the accused that he considered certain things corroborative of the evidence of Mathers the accomplice. Whether those things would or would not have come within the meaning of the 'term corroborative' evidence had such evidence been required by law might have been in such a case a legitimate matter for argument; but I am unable to see how, when the trial judge was acting entirely as a jury and could not be said to have been directing himself upon a matter of law at all, it can be open to this Court to question the propriety of his views on the matter. The second question therefor should not in my opinion be answered otherwise than by saying that it does not raise a point of law which can be reserved.

The third question should in my opinion be answered in the affirmative. The Crown is entitled to make out its case both by asking the court to apply the principle of recent possession and by other more direct evidence of the theft. There is no reason, that I can discern, why both means should not be adopted at the same time. No authority was quoted for the opposite view and the matter appears to me to be too plain for argument.

The fourth question, treating it as a pure matter of law, should I think also be answered in the affirmative. By this I mean that it does not appear to me that any error in law was committed by the learned trial judge in hearing the evidence of the confessed accomplice Mathews before sentence had been passed upon him. The simple question involved seems to be this: Was he at the time he was called by the Crown a competent or an incompetent witness? No serious attempt was made to shew that he was not a competent witness. It is clear that he was, and being so, the Crown had a right to call him. The observations of Cockburn, C.J., in Winsor v. Regina, L. R. 1 Q. B. 289, as explained by him in Reg. v. Payne, L. R. 1 Cr. Cases 354, were only directed to the question of convenience and fairness. It is obvious that in such a matter it must be left to

the discretion of the presiding judge to decide what in each particular case is the fairest and most convenient course to pursue. The learned trial judge here did indeed say that had there been a jury he would have been inclined to take a different course. It was argued that this amounted to an exercise of his disretion against the propriety of admitting the evidence of Mathews and yet he in fact admitted it and acted upon it. In my opinion what he said amounted to nothing more than saying that in other circumstances, viz.: if there had been a jury, he might have guided the course of the trial, either by adjournment or by an immediate passing of sentence upon Mathews before he testified, in a different way from that he thought fit to adopt when sitting alone. Before passing sentence upon Mathews he felt the need of learning more about the case and this he expected to do upon the trial of McClain. He no doubt felt, and quite properly, that he could make all due allowance for the position in which Mathews stood when he came to weigh that person's testimony. While therefore there may be circumstances in which the presiding judge ought to regard the views of Cockburn, C.J., in Winsor v. Regina as a proper guide it is impossible to say that there is any fixed rule of law applicable to the matter which must be followed in all cases.

Question five should be answered in the affirmative. Section 876 of the Code says that "the name of every witness examined or intended to be examined shall be endorsed on the bill of indictment; and the foreman of the grand jury or any member of the grand jury so acting for him shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment." This section is one of five sections, 874 to 878 inclusive, which are under the caption "proceedings before the grand jury." It is true that by sec. 2 (16) of the Code, being the interpretation section, the word "indictment" includes "any formal charge under 873A" but this is subject to the qualification at the beginning of the main section 876 "unless the context otherwise requires." In my opinion it is obvious that owing to the context it is not possible to treat sec. 876 as applying to a charge under 873A signed by the agent of the Attorney-General. It is clear that the words "every witness examined or intended to be examined" refer to the examination before the grand jury, not to examination at the trial

before the petty jury. The agent of the Attorney-General who signs a charge under sec. 873A does not examine witnesses like a grand jury. Very frequently I have seen attempts made to press the analogy between the agent of the Attorney-General in Alberta and Saskatchewan and the grand jury in other provinces, but it is clearly impossible to extend the analogy so far as to make sec. 876 applicable in Alberta. By its very terms the section is incapable of application.

As a measure of fairness and justice the Crown ought to furnish to the accused in some form the names of the witnesses intended to be called in chief to support of the Crown's case. As a general rule this information is sufficiently given by the depositions taken on the preliminary hearing. Any witness there examined should be made available to the defence if the Crown does not intend to call him unless his evidence is unquestionably immaterial. And the name of any additional witness not examined at the preliminary which the Crown proposes to call in chief ought as a matter of fairness at a reasonable early period, at any rate if asked for, to be made known to the accused. But there is no law laying down any definite rule in this matter which must be left to the presiding judge to deal with in such a way as to give all necessary protection to the accused and to give him a fair opportunity to defend himself against the charge. See Rex v. Gleenslade, 11 Cox 413, note.

The result is that the conviction is affirmed.

SCOTT, BECK, and WALSH, JJ., concurred.

Conviction affirmed.

ALBERTA.

HARVEY, C.J. JANUARY 26TH, 1915.

CHAMBERS.

McQUAID v. PRUDENTIAL TRUST CO.

Practice—Evidence—Commission—Rule 395.

Where a party makes an application under r. 395 for an order to have the evidence of himself or those under his control taken on commission, the Master should not make an order until the said party discloses such facts as would satisfy him that it was "necessary for the purposes of justice," and leave should be given to both parties to file affidavits as on ordinary motions.

Park v. *Schneider* (1912), 5 A. L. R. 423, referred to.

An appeal from the order of the Master giving directions to have the evidence of some of the officers of defendant company taken on commission.

A. U. G. Bury, for plaintiff, appellant.

S. W. Field, for defendant, respondent.

HARVEY, C.J.:—On motion for directions the defendant, whose head office is in Montreal, asked to have the evidence of some of its officers there taken on commission. The plaintiff objected, and there was no material before the Master to shew the necessity for the order asked for. The Master made the order, but provided that the evidence so taken should not be read at the trial without leave of a judge.

It is true that the plaintiff is furnished some protection by this proviso but I think he should not be called on to meet an examination at an outside place until some reasonable ground of necessity is shewn.

Rule 395 provides that evidence for use at trial may be taken by commission "When it appears necessary for the purposes of justice" while Rule 225 provides that no affidavit shall be used on a motion for directions except by leave.

There is no doubt that in a great many cases directions even for commission can be given without any objection and therefore without the necessity of any affidavit and it is quite evident that where the witness to be examined is one over whom the party has no control counsel might offer no objection while he might object when the application is to take the evidence of a party or its employees.

The case of Park v. Schneider (1912), 5 A. L. R. 423, and the authorities therein cited clearly establish the need to make out a strong case to enable a party to give the evidence of himself or those under his control when the opposite party has ground for requiring their presence in court.

It does not appear from the report, but it is a fact that in that case the order which was made by me authorizing an examination of the plaintiff for discovery with leave to the plaintiff to use such examination at the trial by leave of the trial judge was the best order the plaintiff could get on a second application for a commission, the first having been refused.

Before a proper discretion can be exercised the circumstances of the case must be disclosed and I am of opinion that the Master should have declined to make the order asked

for until the defendant disclosed such facts as would satisfy him that it was "necessary for the purposes of justice" giving leave to both parties to file affidavits as on an ordinary motion. I will, therefore, allow the appeal but as it is a comparatively new point of practice the costs will be costs in the cause.

Appeal allowed.

ALBERTA.

BECK, J. JANUARY 23RD, 1915.

REX v. TALLY (2 CASES).

Criminal Law—Reswearing of Information after Amendment—Jurisdiction of Justice of Peace — Territorial — Hearing and Conviction—Implied Request from Justice taking Information—Justices of the Peace Act, 1906, sec. 13—Amending Act, 1907, sec. 5—Common Assault—Persons Charged Separately but Tried Together — Offences Forming Part of same Occurrence—Evidence Identical—No Objections made at Hearing—Adjournment to Obtain Counsel—Refusal of—Bona Fide Exercise of Discretion.

It is not necessary to reswear an information after an amendment, if the said amendment only gives greater particularity or certainty to the charge and does not create a new charge, i.e., a charge of a different kind of offence or of a similar offence at a time or place materially different from that first alleged.

Where an accused person has the right to insist upon an information being resworn and does not avail himself of the right he thereby waives the irregularity.

Rex v. *Lewis*, 6 C. C. C. 499, referred to.

There is no law, statute or otherwise, requiring a charge to be laid or dealt with by the justice of the peace nearest the place where an offence is committed. But, *semble*, where there is a gross abuse of authority by a justice the court has power to interfere and prevent the said abuse on the ground that the accused was prejudiced in his right to "make his full answer and defence," and that therefore the justice lacked jurisdiction.

Rex v. *Farrell*, 15 O. L. R. 100, referred to.

An implied request on the part of a justice of the peace before whom an information is laid is sufficient to confer jurisdiction upon another justice to try the accused under sec. 9 of ch. 5 of the Alberta Statutes of 1907, amending the Act respecting Police Magistrates and Justices of the Peace, Ch. 13 of the Alberta Statutes of 1906.

Rex v. *Cruikshanks*, 27 W. L. R. 759, followed.

Where several accused persons were charged separately with the offence of common assault, the two assaults forming part of the same occurrence, the evidence in each case being identical, and no objection having been made at the hearing, it was *held*, that the charges might be tried together.

Unless it appears that the refusal of a justice to grant an adjournment results in the accused being prevented from having a fair trial—from making "his full answer and defence"—the *bona fide* exercise of discretion by the justice cannot be reviewed.

Two motions to quash two convictions made by a justice of the peace, upon charges of common assault.

Popple, for the Crown.

J. M. Macdonald, for defendants.

BECK, J.:—These are two motions to quash convictions, the proceedings being—or being taken to have been—certified to the court in pursuance of the notices of motion given in pursuance of the new rules in that behalf.

A number of objections are taken.

The first objection is that the informations charge no offence.

The information in one case is a charge that the defendant "did wilfully run into my hay rack and injured the same and did threaten me with an axe;" in the other; "did threaten me with a pitch fork."

Whether or not these informations disclose an offence in law, I think any defect that may exist cannot affect the validity of the conviction, and this for two reasons. First, both the informations were amended by the addition of the words "contrary to sec. 291 of the C. C." That section reads: "Every one who commits a common assault is guilty of an indictable offence and liable, if convicted . . . on summary conviction, &c."

This addition at all events made the intent and meaning of each charge quite clear as a charge of common assault. The objection is taken that the information was not resworn after amendment.

It seems to me that in no case is it necessary to reswear an information after an amendment, if the amendment is of such a nature only as that it merely gives greater particularity or certainty to the charge and does not amount to the laying of a new charge, i.e., a charge of a different kind of offence or of a similar offence at a time or place materially different from that first alleged. Even if the accused had a right to insist upon the informations being resworn, they waived the irregularity—if such it was—by refraining from taking the objection. R. v. Lewis, 6 C. C. C. 499.

Second, sec. 724 of the Code which forms part of Part XV., "Summary Convictions," says that no objection shall be allowed to any information . . . for any alleged defect therein in substance or in form or for any variance between such information . . . the evidence, &c."

So that if the evidence, as it appears in the depositions, establishes such facts as justified the justice in convicting of a common assault, and if he did so the wording of the informations may be disregarded. This I think might have been said even if the informations had not been amended inasmuch as they at least indicate, if not allege, a common assault. With the amendment it seems to me no question can arise.

Another objection is that the charges should have been, and were not, laid and heard before the nearest magistrate.

The Provincial Legislation respecting police magistrates and justices of the peace in ch. 13 of 1906; ch. 5, sec. 9 of 1907; ch. 20, sec. 10 of 1908; ch. 4, sec. 8 of 1909.

Section 2 of ch. 13 of 1906 says that the Lieutenant-Governor in Council may appoint justices of the peace for the province, who shall have jurisdiction as such throughout the same.

There is no statutory provision requiring a charge to be laid or dealt with by the nearest justice nor is there any other law that I am aware of requiring this; though I have no doubt that if it appeared that there was gross abuse of the authority of a magistrate by, for example, compelling the attendance of the accused at a place extraordinarily far from his home and the place where the offence was alleged to have been committed, and where all the witnesses resided, while a competent and impartial justice was available near the place of the alleged offence, this court would have power to intervene and prevent the abuse of the process of the inferior court, on the ground that the defendant was prejudiced in his right to "make his full answer and defence" (sec. 715 Code), and that therefore the magistrate lacked jurisdiction. Rex v. Farrell, 15 O. L. R. 100.

The third objection is that the charge was not tried by the justice who took the information and there is no evidence of a request to the convicting justice to try the case.

Section 9 of ch. 5 of 1907, adds a section to ch. 13 of 1906, as follows: "9a. Jurisdiction in any particular case shall exclusively attach in the first justice of the peace or

where more than one justice is required, the first justices to the required number duly authorized who has or have possession and cognizance of the fact.

"Provided that at the request of any such justice or at the unanimous request of any such justices where more than one justice is required any other justice or justices may take part in any case."

The informations were sworn before William Dives, J.P. The cases were tried before, and the convictions made by, William Macdonald, J.P.

The convictions are in the usual form—the form provided by the Criminal Code Forms Nos. 31, 32, 33, "Be it remembered that on the day of in the year at A. B. is convicted before the undersigned a justice of the peace for the said" (Province).

Neither these forms nor the convictions in the present cases shew the information to have been laid otherwise than before the convicting magistrate. This, however, is shewn by the papers produced before me, namely, the informations; but other papers also produced namely recognizances on the part of both accused to keep the peace, bearing the same date as the convictions and alleging the same offences appear to have been taken at the same place before both Dives and MacDonald as justices of the peace. It would appear then that the justice before whom the information was laid was present when the justice, MacDonald, heard the case. Furthermore in an affidavit filed on behalf of the defendants it is said: "I further asked him" (MacDonald) "if he had any request from the justice of the peace who took the information, to try the case, and he said that he had not, and that it was the fault of the mother of the accused, as she objected to them being tried before the justice of the peace who took the information." I infer from this, that owing to objection Justice Dives refrained from trying the case, and thereby inferentially consented and requested Justice MacDonald to try the cases. An implied request is sufficient. Rex v. Cruikshanks, 27 W. L. R. 759.

In The King v. Akers (No. 3), 16 C. C. C. 222, it was held that while the conviction could not be supported inasmuch as it did not appear on its face that the convicting magistrates acted at the request of the police magistrate before whom the information was laid, there being a statutory provision to the effect that no other justice should in such case

act except in case of the illness or absence or at the request of the police magistrate, yet the defendant should not be discharged (the application was for habeas corpus), but the conviction should be remitted to the convicting magistrates for amendment according to the facts. This order was made in pursuance of a provision of the Ontario Liquor License Act, but it seems clear that a similar power exists under sec. 1120 of the Criminal Code. Being of opinion that the convicting magistrate was fully justified in convicting I would, if I was not satisfied that there was not an implied request, have directed that the convictions be remitted to the convicting magistrate to be amended by inserting in the convictions after the word "Province" the words: "acting in this behalf at the request of William Dives, a justice of the peace, in and for the said Province before whom the information herein was laid." If this be according to the fact instructing the convicting magistrate in accordance with the decision of this Court in Rex v. Cruikshanks (supra), that an express request is not essential under the Act, but that a request may be implied from the conduct of the justice who received the information. But the convictions appearing to be valid on their face, and I myself, being satisfied by the extrinsic evidence that there was a sufficient request by implication, I think the objection may be disregarded in view of sec. 1124. R. v. McGregor, 26 O. R. 115, 2 C. C. C. 410; R. v. Perrin, 16 O. R. 446.

The next objection is that the two charges, that is, separate charges of common assault against each of the defendants, were tried together without the consent of the defendants.

The depositions shew that had the cases been tried separately the evidence would have been identical in each case; that, in other words, the assaults, charged separately against each defendant, both took place, as part of one and the same occurrence. Under these circumstances no possible injustice could be done to either defendant and the reasoning in the cases of Rex v. Fry, 19 Cox. C. C. 135, and The King v. Lapointe, 20 C. C. C. 98, leads to what I think is the proper conclusion that the convictions should stand as against this objection—at all events, as it does not appear that any exception was taken at the hearing to this course being taken.

The next objection is that the informations and convictions contain two separate and distinct offences.

This objection is virtually dealt with under the head of the first objection. In any case it is evident that in each case the charge was treated as one of common assault; and if this offence is improperly or insufficiently set forth in the convictions, the objection on this ground is ineffective by reason of sec. 1124, inasmuch as on a perusal of the depositions I am satisfied that an offence of the nature described in the conviction has been committed.

The sixth objection is that evidence was wrongfully admitted by way of a petition.

I do not find that this objection is established as a fact. There is such a petition, but it is attached to the recognizances to keep the peace. I would presume that it was used by the magistrate—and I suppose improperly—in connection with binding the accused over to keep the peace; but there is nothing to shew that it was used as evidence on the charges of assault or that it influenced the magistrate in determining the question in issue on the trial.

It is objected that the evidence does not sustain the conviction. Though the evidence for the prosecution is met by an alibi in each case, it, if believed by the magistrate, certainly supports a conviction of both defendants for a common assault.

It is objected, and the fact is that the conviction assigns no date to the offence. This defect, however, can be supplied from the depositions by virtue of sec. 1124, already referred to.

It is objected that the information was not resworn after amendment. I have already dealt with this when dealing with the first objection.

It is alleged that the defendant, Ivan Tally, asked for an adjournment in order that he might have counsel to represent him.

The fact of the request and the magistrate's explanation appear in an affdavit filed on behalf of the defendant which states:

"I asked him" (the magistrate. "also why he did not grant the request of the accused for an adjournment to get counsel, and he said it was impossible, as the witnesses were there from a long distance, and he himself was going away to the country the next day, and would be absent some considerable time."

The place of trial was Morinville, some 25 or 30 miles from Edmonton, the nearest point at which counsel could be procured, if there were none at Morinville, where if there is a practicing barrister or solicitor, there is only one.

Unless it appears that the refusal of a magistrate to grant an adjournment results in the accused being prevented from having a fair trial—from making "his full answer and defence"—the magistrates bona fide exercise of discretion cannot be reviewed. Without going so far as to say that in no case, however intricate and serious would a magistrate's refusal of an adjournment for this purpose induce the inference that the accused had been deprived of a fair trial, I think he could not reasonably be considered to have been prejudiced in such a case as the present. See King v. Irwing, 14 C. C. C. 489.

I was said the costs fixed were excessive. I cannot find this substantiated.

The motions should be dismissed with costs.

Convictions affirmed.

ALBERTA.

HARVEY, C.J. JANUARY 26TH, 1915.

CHAMBERS.

WALKER v. CARD.

Interest—When Payable without Express Agreement—Court May Allow When it Seems Fair and Equitable to Allow it—Statutes of Alberta 1908, ch. 20, sec. 1.

Where a purchaser agrees to pay interest on the purchase money before default, the court has power, under sec. 1 of ch. 20 of the Statutes of Alberta, 1908, to allow interest after default when it seems fair and equitable to do so, at such rate and at such time as it may think right.

This is an action against the purchaser of land for the balance of the purchase money. On application for judgment before the Master he gave the usual judgment for specific performance giving the defendants four months to

redeem without giving any personal judgment against them, and allowing the plaintiff no interest on the purchase moneys after default until the commencement of the action after which he allowed interest at 5 per cent. This is an appeal with respect to interest only.

R. D. Tighe, for plaintiff, appellant.

No one, contra.

HARVEY, C.J.:—The clause in the agreement reserving interest following the covenant to pay the purchase price is as follows: "Together with the interest thereon at the rate of 8 per cent. per annum on the days and times in manner above mentioned."

Now, assuming that this does not constitute an agreement to pay interest after default clearly the purchaser ought to pay the purchase money when due, both because he has promised to do so and because he has not promised to compensate by payment of interest if he fails.

The payment may therefore be quite aptly said to have been improperly withheld" in the terms of clause 15 of sec. 10 of the Judicature Ordinance as enacted by sec. 1 of ch. 20, of 1908, which is as follows:—

"15. In addition to the cases in which interest is by law payable, or may by law be allowed, the court may in all cases where in the opinion of the court the payment of a just debt has been improperly withheld, and it seems to the court fair and equitable that the party in default should make compensation by the payment of interest, allow interest for such time and at such rate as the court may think right."

In Toronto Ry. Co. v. City of Toronto, [1905] A. C. 117, a case under the Ontario statute which provided that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it" it was held "that in all cases where in the opinion of the court the payment of a just debt has been improperly withheld and it seems to be fair and equitable that the party in default should make compensation by payment of interest it is incumbent upon the court to allow interest for such time and at such rate as the court may think right."

It is apparent that the words of our statute are taken expressly from this decision, the only difference being that the statute says, "the court may allow" and the judgment says, "it is incumbent for the court to allow."

I am of opinion that there is no difference in meaning in this particular case, for even if "may" should not be construed as meaning "shall," it is apparent that it is the court's duty to do what seems to it to be fair and equitable, and, therefore, if it seems to it to be fair and equitable to allow interest it ought to allow it, since the power is given it to do so.

In the present case I can see no equitable ground for withholding interest.

The plaintiff has been deprived of his money and the defendants have had the use of it and there is nothing to shew that the plaintiff has had any compensation. As to the rate, the parties agreed that 8 per cent. was a fair rate before default and it ought to be more rather than less after since the vendor might be put to much inconvenience by not receiving it when expected. Moreover the financial conditions which have arisen by reason of the war since the agreement of the parties and which have existed since the default renders 8 per cent. a reasonably low rate. I am of opinion, therefore, that the plaintiff ought to be allowed the same rate after default as before and that the defendants should only be entitled to a conveyance upon payment of interest at that rate until the time of such payment.

The appeal will be allowed with costs and the decree of specific performance amended as above indicated.

Appeal allowed.

THE

Western Law Reporter

VOL. XXX. TORONTO, FEB. 15, 1915. No. 8

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

BERGSTROM v. EDWARDS ET AL.

Practice—Setting Aside of Judgment—Payment of Costs as Condition Precedent.

Where a judgment for the plaintiff is set aside on condition that the defendant pay the costs before the trial is proceeded with, payment of the said costs is a condition precedent to the trial and, accordingly, a judgment obtained by defendant dismissing the action before the said costs had been paid, through the accidental non-appearance of plaintiff, should be set aside.

Appeal from the order of the district court judge dismissing an application by plaintiff to set aside a judgment entered for defendant.

The appeal was heard by HAULTAIN, C.J., BROWN, and ELWOOD, JJ.

T. P. Morton, for plaintiff, appellant.

J. C. Martin, for defendants, respondents.

BROWN, J.:—This is a district court action in which there is a claim and counterclaim. On May 5th last, at the sittings of the district court at Watrous, judgment was given in the plaintiff's favour for the amount of his claim and costs. Owing apparently to some misunderstanding, the defendants were not present at the trial, nor were they represented by counsel. Application was made to have this judg-

ment set aside, and on July 2nd the following order was made:—

"Judgment herein will be set aside on the following terms:—

"1. That the defendant pay the costs of entering such judgment, the costs of the day, which I fix at $15, exclusive of witness fees; that he pay the costs of opposing this application, fixed at $20, and that he proceed to trial at the coming sittings of the district court here; these costs payable within fifteen days; in the event of the defendant not complying with this order, this application to be dismissed."

On the same day the plaintiff's solicitors sent the defendants' solicitors a statement of the costs which they claimed were payable under the order, amounting in all to $55.35. These costs were not taxed, and the correctness of the statement is disputed by the defendants. There does not, however, appear to have been any objection taken to them until July 14th. The defendants are by the order given 15 days within which to pay the costs, and the court at which they were ordered to proceed with the trial opened its sessions on July 7th, just 5 days after the order was made. Counsel for both plaintiff and defendants appeared at the opening of the court, and this case was spoken to. There is to some extent a conflict in the affidavit material filed by counsel as to what took place at that time. The judge must, I think, have accepted the defendants' version as correct, in view of his subsequent action in refusing to open up the judgment. The judge himself would, at least to some extent, know what took place, having presided at the trial. Assuming, therefore, as I think this court should, that the defendants' version is the correct one, counsel for the plaintiff asked that this case be placed on the list among the first cases to be tried. This request was opposed by counsel for the defendants on the ground that the defendants were not prepared for trial at that stage. In the result the case appears to have been set down on the list to be tried on July 10th, but was in fact not reached until the 13th. On the 13th counsel for the defendants appeared, but counsel for the plaintiff failed to appear, and judgment was given dismissing both the claim and the counterclaim with costs. Plaintiff's counsel explains his absence by saying that the case was called a day earlier than he expected. The plaintiff now in his turn applies to

the trial judge to have this latter judgment set aside on the ground, inter alia, that the costs had not been paid before trial as ordered. The judge dismissed the plaintiff's application with costs, and it is from that order that the plaintiff now appeals to this court.

Counsel for the defendants met the plaintiff's application with the statement that in view of counsel for the plaintiff urging the early trial of the action he assumed that the payment of the costs was not being insisted on as a condition precedent to the trial because, as yet, the 15 days within which these costs were to be paid had not expired. Apparently the question of payment or non-payment of the costs was not mentioned to the trial judge by either counsel, and he must very naturally have assumed that they were paid or that payment was waived.

I am of opinion that all this trouble and unnecessary expense has been clearly brought about by needless misunderstanding, of which both sides have been equally guilty. I think justice will be done by putting both parties where they were when the order of July 2nd was made. I would set aside the judgment of July 13th, and direct that the action should proceed on the basis of the order of July 2nd. The costs referred to in that order should be taxed and paid within 15 days after taxation; if so paid the parties should be allowed to proceed with the trial of the action as they may be advised. If the costs are not so paid, the original default judgment of May 5th should stand. Neither party should have any costs of any proceedings taken subsequent to the order of July 2nd.

ELWOOD, J.:—On the 2nd day of July, 1914, the district court judge at Saskatoon ordered a judgment theretofore entered by the plaintiff against the defendants to be set aside on the following terms, namely, that the defendant pay the costs of entering such judgment, the costs of the day which he fixed at $15, exclusive of witness fees; that he pay the costs of opposing the application to set aside the judgment, fixed at $20; and that he proceed to trial at the then coming sittings of the district court at Saskatoon, these costs payable within 15 days. In the event of the defendant not complying with the said order, the application to set aside the judgment to be dismissed. On the same day the plaintiff's

solicitors wrote to the defendant's solicitors enclosing a memorandum of the costs. To this letter the defendants' solicitors never replied until the 14th July, 1914. The costs mentioned in the letter of the 2nd July, in addition to the above items of $15 and $20, were as follows: witness fees, $7.40; judgment and taxation of costs, $12.95. The sittings of the district court next following the 2nd of July commenced on the 7th of July, and on the same day the solicitors for the defendant and plaintiff consented to have the action placed on the peremptory list to be tried on the 10th of July, 1914. The action was apparently not reached on the 10th of July, but on the 13th July, 1914, it was reached. The plaintiff was not present at the trial, and was not represented by counsel, and the district court judge dismissed the plaintiff's action with costs. None of the costs mentioned in the order of the 2nd July, 1914, have even been paid, and the letter of the 2nd July, 1914, distinctly stated that the costs which must be paid before the judgment could be set aside were as stated in that letter. It was contended by the respondents that the appellants, by consenting to have the action placed on the list for trial on the 10th of July, waived his right to have his costs paid as a condition precedent to the trial, and that, the sittings of the district court having been fixed for a period within 15 days of the 2nd of July, it must have been intended that payment of the costs was not a condition precedent to the trial. I cannot give effect to either of such contentions. The order of the 2nd July did not set aside the judgment, but states that the judgment "will be set aside on the terms therein contained being complied with," and provides that in the event of the defendants not complying with the order the application be dismissed. Now, the only terms that the defendants were to comply with were that they proceed to the trial and pay the costs. So far as the proceeding with the trial is concerned, the trial could not proceed until the judgment then entered had been set aside, and it seems to me, therefore, obvious that the sole condition upon which the judgment would be set aside was the payment of the costs. The defendants did not pay these costs; they never objected to the amount of the costs until after they had obtained judgment dismissing the action. If they had wished to object to the amount of the costs or to have the costs taxed they should have notified the plaintiff's

solicitors; and not having done that, and not having paid the costs, they were not entitled to proceed with the trial of the action.

In my opinion the judgment dismissing the plaintiff's action should be set aside and the defendants should pay the costs of the application of the plaintiff to the district court judge to set aside such judgment and of this appeal.

HAULTAIN, C.J., concurred with BROWN, J.

Appeal allowed.

SASKATCHEWAN.

NOVEMBER 28TH, 1914.

SUPREME COURT EN BANC.

LECKY & CO. v. CARMAN.

Contract—Building Contract—"Entire Contract"—Waiver.

A contract by which a building contractor agrees to accept payment for the construction of a building in monthly instalments computed according to the amount of labour expended and material used plus 10% of the value thereof during the said period is not an *entire* contract and the contractor may sue for the instalments as they accrue due.

Where a contractor enters into an *entire* contract to construct a building upon a definite piece of land and, after the building is completed, it is discovered that it encroaches upon land which is not the property of the owner of the building, an agreement between the contractor and the owner that the former would procure for the latter a transfer of the said land creates a waiver of the *entire* contract.

Appeal from the judgment at the trial in favour of plaintiff in an action on a building contract.

The appeal was heard by HAULTAIN, C.J., LAMONT, BROWN, and ELWOOD, JJ.

J. A. Allan, K.C., for defendant, appellant.

H. Y. MacDonald, K.C., for plaintiff, respondent.

ELWOOD, J.:—The evidence in this case shews that at the time that it was arranged between the plaintiff and the defendant that the building in question should be erected,

there was no definite sum arrived at as to the cost of the building. The learned trial judge found that the arrangement was that the plaintiff should be paid the cost of labour and material plus 10 per cent. No definite arrangement was arrived at as to when the payment should be made, but the practice adopted was for the plaintiff, at the end of each month, to render a statement of the work and material furnished during the month and add thereto 10 per cent. No objection was apparently made to this; and on these statements so rendered payments from time to time were made by the defendant to the plaintiff aggregating $32,278.05. When the plaintiff was first told to go ahead with the building, the defendant contemplated that it should be one-storey. This was subsequently changed to two storeys, and from time to time alterations were made. When the building was finally completed it was found that it encroached to the extent of one half-inch on an adjoining lot. Objection was made to this, and it was arranged between the plaintiff and the defendant that the plaintiff should procure a title in the defendant's name to this one half-inch. Prior to the commencement of the action a quit claim deed to the defendant was procured for this one half-inch, and after the commencement of the action, before the trial, a transfer was procured to the defendant for the half-inch. It was contended on behalf of the appellant that the contract to erect the building was an entire one, and, the building having encroached upon the adjoining lot, the plaintiff was not entitled to commence an action until it had procured to the defendant the title to the adjoining half-inch. In Halsbury, vol. 3, p. 182, I find the following:—

"An entire contract means one where the entire fulfilment of the promise by either party is a condition precedent to the right to call for the fulfilment of any part of the promise by the other."

Under the circumstances of this case I am of the opinion that this was not an entire contract, that the understanding of the parties was that the plaintiff should, at any rate at the expiration of each month, be entitled to receive from the defendant payments for the labour and material furnished plus 10 per cent. thereof, and that under those circumstances the plaintiff could from time to time recover from the defendant these payments as they accrued due: that the

remedy of the defendant, if any, would be an action for damages for what damages the defendant might sustain in consequence of the encroachment on the adjoining property. On the question of entire contract I would refer to the notes to Cutter v. Powell, 2 Smith's Leading Cases, p. 1, and to the case of Roberts v. Havelock, referred to at p. 19. In any event I am of the opinion that if the contract was an entire one there was a waiver created by the agreement between the plaintiff and the defendant that the plaintiff should furnish the defendant the title to the half-inch in question. The objection which the defendant was making all along was that the charges for the material, work and labour which were being charged for were excessive, and he wished the correctness of those amounts investigated. The other contention on behalf of the defendant is that the contract was one for the erection of a building at the cost thereof plus 10 per cent of such cost, with the sum of $40,000 as the maximum. The learned trial judge has found on the evidence that the intention of the parties was not to limit the amount to $40,000. There was abundant evidence to justify such finding; and without going into the evidence I might point out that the contract which was sent to Mr. Carman to sign did not limit the amount. It is quite true Mr. Carman did not sign that contract, but he had it before him, he saw what constructions the plaintiff was putting on the understanding between the parties, he made no objection to this, and as late as the 18th November, 1913, he wrote a letter to the plaintiff, and he did not anywhere take the position that the contract price was limited to $40,000. That letter to my mind is totally inconsistent with the contention of the defendant that the contract was so limited, but is entirely consistent with the contention that the sum of $40,000 was a mere estimate.

The trial judge having found the contract to be one which was not limited to $40,000, and there being evidence to justify such finding, I do not think that finding should be disturbed.

The result, in my opinion, is that the appeal should be dismissed with costs.

BROWN, J.:—I have perused the judgment of my brother Elwood in this case, and concur in the result which he has

reached. I do not wish to be understood as assenting to the proposition that the plaintiffs were entitled at any time to recover any part of their contract-price in the face of the fact that the building was partly erected on property which did not belong to the defendant. This matter was, however, fully remedied before trial, and I concur in the view that what took place between the parties in the way of remedying this defect constituted a waiver of the objection.

Appeal dismissed.

BRITISH COLUMBIA.

MACDONALD, J. JANUARY 8TH, 1915.

TRIAL.

VICK v. MORIN & THOMPSON.

Negligence — Intervening Third Party — Child of Tender Years Injured—Doctrine of Contributory Negligence.

Defendant who was engaged in placing steam fitting in the basement of a school which, to his knowledge, was used by the children to play in, left a detached section of a steam heater about five feet in height and weighing about 500 lbs. on the floor. The said section being in the way of the children the caretaker of the school removed it from the floor and placed it together with another similar section in an almost perpendicular position against the wall. The said section fell upon a child of nine years of age who was injured.

Held, that the act of placing the sections against the wall under the circumstances was an act of gross negligence, it being immaterial whether or not the child was guilty of contributory negligence, but that *defendant* was not negligent since he could not have been expected to take precautions to prevent an accident which could not reasonably have been forseen by him.

An action for damages for injuries received by the plaintiff, a boy of 9 years, through the alleged negligence of defendant, under the circumstances set forth below.

Alexander MacNeil and M. A. Macdonald, for plaintiff.

E. S. H. Winn, for defendant.

MACDONALD, J.:—Plaintiff on the 6th of January, 1914, was attending the public school at Phoenix, B.C. He was

aged 9 years and while playing in the basement of the school had his leg broken by an iron section of a steam heater falling upon him. It appears that this piece of iron was about 5 feet in height and weighed over 500 lbs. It had been supplied by the defendants in the construction of a steam heater, but shortly before the accident it had been detached from the heater and remained on the floor for a short time. It was then with another like section placed against the wall of the basement in an almost perpendicular position. In view of the circumstances, this was an act of gross carelessness and most reprehensible as what happened was most likely to occur. The children used this basement in cold weather as a playground. To my mind it is immaterial as to what exactly caused the iron section to fall and in the excitement of his play it is not probable that the plaintiff could recollect with any particularity the events that took place just prior to his being thrown to the floor. Even if he had taken hold of this section having regard to his age and experience, I would not consider him to blame.

In expressing this opinion as to the infant plaintiff not being liable under such circumstances, I am following the view of the law expressed in Ruegg, 8th ed., and cases there cited, in preference to that in Mayne on Damages, 8th ed., p. 83. I might state that one of the cases cited in Mayne in support of the statement that "it is now settled that the doctrine of contributory negligence applies to infant plaintiffs" is questioned if not expressly over-ruled, in Clark v. Chambers (1878), 3 Q. B. D. 327, at p. 339, where Chief Justice Cockburn on this point refers to Mangan v. Atterton, 4 H. & C. p. 338, as "obviously in conflict with other cases cited." Channel, B., in Gardner v. Grave, 1 F. & F. 359, says "The doctrine of contributory negligence does not apply to an infant of tender age." I do not think plaintiff did anything which it is unreasonable to expect such a child to do. Where then does the liability rest for the pain, suffering and expense consequent upon the accident? It was the duty of the board of school trustees to have the basement reasonably safe as a playground, but the action is not against the board. It is sought to hold the defendants liable as having not only supplied the iron section which caused the injury but for carelessly leaving it in a place where such result might happen. Notwithstanding the strong contention to the contrary, I am

quite satisfied that the defendants were the contractors for the installation of the steam heater and as such supplied the section in question. Such a weighty piece of iron was not necessarily dangerous if allowed to remain on the floor in the course of their work, or for a short time after it had been temporarily discarded. As soon as the children resumed the use of the basement after the Christmas holidays it became apparent that it was an inconvenience in the course of their play but did not while in that position cause any injury. It was moved and placed against the wall so as to be a standing menace to the safety of the children. This was clearly an act of negligence, but, assuming that it was not done by a servant or agent of the defendants but by a third party, then are the defendants liable? Defendants were not called to give evidence on their own behalf and certain admissions made by them to the father of the plaintiff remained uncontradicted. They appear to have gone some length in such admissions, if they did not consider themselves to blame, but, on the other hand, their statements may have only been actuated by sympathy and the thought that although not to blame still they had supplied the material which, through the carelessness of another party, had caused the injury. Defendants as contractors only had a limited use of this basement and after the holidays, except for repairs or adjustments to the steam heater, the board had complete possession and control of such basement. They are not thus in the same position as the defendants in Makins v. Piggott and Inglis, 29 S. C. R. 188. This iron section was not under ordinary circumstances something that might be considered dangerous to human life or limb. Defendants, however, knew that the basement was being used as a playground and the question is if the thing left might under such circumstances be dangerous to the children. Considering its size, weight and shape, was it an obstruction to the use of the playground that the defendants might reasonably expect its removal? "There can be no negligence unless there is a duty"—Lord Dunedin in Nocton v. Ashburton, [1914] App. Cas. 932 at p. 964. Such a duty may arise in many ways. Even assuming that the defendants might expect that the section would be removed to give freer play to the children, still defendants doubtless would contend that they were not negligent because they might presume that in removal it would

not be placed in such a dangerous position. Have the defendants a right to assume that such material would be properly disposed of? Was there a duty cast upon them to see that no danger was likely to result to those whom they were aware had the right to use the premises—that a thing, not inherently dangerous, might become so in any such manner as here occurred? It was certainly an obstruction and one which would likely be speedily removed to some place near at hand. In Clark v. Chambers, supra, a barrier armed with spikes was placed by the defendant upon the road and moved by a third party to another portion of the highway where the plaintiff was injured. While the instrument dealt with is not of a similar character to the one considered in this action still the decision assists in determining the point as to the liability of a person obstructing a public or private place. Chief Justice Cockburn refers to the liability of a party placing the barrier on a road as follows:—

"A man who unlawfully places an obstruction across either a public or a private way might anticipate the removal of the obstruction by some one entitled to use the way as a thing likely to happen, and, if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near. If the obstruction be a dangerous one wheresoever placed, it may, as was the case here, become a source of damage from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that if a person places a dangerous obstruction on a highway or in a private road over which persons have a right of way he is bound to take all necessary precautions to protect persons exercising their right of way and that if he neglects to do so he is liable for the consequences."

This quotation would absolutely govern the situation if the obstruction placed by the defendants in this playground were held to be a "dangerous one wheresoever placed."

In Glocker v. London County Council and Chappell, 28 T. L. R. 359, both the defendant council, which had the management or control of the school, and Chappell, who was employed to carry out certain repairs to the school, were held liable. In that case the contractor sent to the school a truck containing materials known as rough stuff and composed of 4 parts of sand and 1 part of lime with a little hair. The

truck and its contents were left at the suggestion of the caretaker in a corner of the boys' playground. When the school re-opened after the Christmas holidays, the headmaster noticed the truck and gave instructions to the caretaker to have it removed as he considered it dangerous. The caretaker telephoned to the contractor asking him to remove it, but he did not do so. At the close of the school in the afternoon as the boys were leaving, the truck, which had been left unguarded, tipped over and one of the boys threw a portion of the contents and injured the eyes of the plaintiff. The action had been tried before a judge and jury and the trial judge expressed great doubt as to whether there was any evidence of negligence fit to go to the jury. He instructed the jury that they must be reasonably satisfied that the accident which happened was one which might reasonably have been anticipated by the defendants and guarded against. It was a question of degree and it was difficult to say when near the border line on which side the case fell. It was more a question of fact than of law. Judgment having been given for the plaintiff against each of the defendants, the matter came before the Court of Appeal for consideration. Lord Justice Vaughan Williams stated that the jury had found, in substance, that the accident was one which might have been anticipated from the mere fact of leaving the truck where it was. He held that the jury had also found that such truck was dangerous on account of being left where it might have been a convenient plaything for the boy. Reference was made to the fact that the schoolmaster had recognized the truck as a source of danger. No particular reference was made to the contents of the truck being dangerous while in the playground on account of the nature of the mixture.

In Cooke v. Midland & Great Western Ry. of Ireland, [1909] A. C. p. 229, the defendant company was held liable through permitting children to go on its premises and play with a turntable which was in a dangerous condition. The House of Lords held that under the peculiar circumstances there was evidence of negligence to go to the jury. The article thus allowed to be used by the children was in itself dangerous and the decision does not to my mind assist the plaintiff in this action. It is contended, however, that from the remarks of Lord Macnaghten in this case, referring to Lynch v. Nurdin (1841), 1 Q. B. p. 29, the section in ques-

tion left as it was should be considered a "nuisance." This contention is entitled to considerable weight but I do not think should be accepted.

In Bailey v. Neill (1888), 5 T. L. R. p. 20, a child aged 9½ years left school and while trying to climb on a roller standing on the street near the school got his fingers caught in the wheels in consequence of another boy tampering, in play, with the shafts of the roller. Defendants were held not liable, but in that case great precautions had been taken to secure the roller and keep it in place.

As to the removal of the section, Barnes, the schoolmaster, gave instructions to the caretaker on account of its inconvenience to the children. He was a favourable witness for the defendant and while he did not give specific evidence as to how the removal of this particular section took place he accepted the responsibility of having placed the other section against the wall in like position. He seemed disposed to have the court draw the inference that the section which caused the injury was moved by the caretaker under his instructions though he could not be certain in this connection. It was stated that the caretaker was in attendance at the trial but he was not called as a witness by the defendants.

Assuming that the section in question was placed against the wall by the schoolmaster or the caretaker, could the defendants expect that such a careless act would have been performed and were they required on that account to take precautions to prevent an accident occurring. Was such an act "of a sort that might have been foreseen and very easily prevented?" I do not think so. If the section had been left on the floor, as far as the evidence discloses, it would only have been an inconvenience and not a danger to the children while engaged in play. It only became dangerous through the neglect of some third party who did not purport even to act on behalf of the defendants. The accident to the plaintiff is to be regretted, but, in my opinion, the action should be dismissed. This does not preclude the plaintiff from bringing action against any other person or persons in connection with his injury.

Defendants are entitled to their costs but if their sympathy towards the plaintiff and his father is the same as at the time when the boy was in the hospital then they may be inclined to forego such costs.

ALBERTA.

JANUARY 28TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

REX v. MARCEAU.

Criminal Law — Keeping Disorderly House — Sufficiency of Evidence to Support Conviction—Jurisdiction of Magistrate—City in Which Offence Committed not Referred to in Depositions but Jurisdiction Apparent on Face of Conviction.

Where jurisdiction appears upon the face of a conviction the court ought not to scrutinize the depositions in order to discover an absence of *exact* evidence to establish local jurisdiction.

Rex v. *Can. Pac. Ry. Co.*, 1 A. L. R. 341, followed.

Where the evidence established that there was found in a house all the accessories to the keeping of a bawdy house, that there had been one act of sexual intercourse, and that the accused admitted that for 3 or 4 days before the day upon which she was charged with keeping a bawdy house that she had kept such a place, it was *held*, that, although there was no evidence of the general reputation of the house, there was sufficient evidence to justify the conviction.

An appeal, under Rule 20 of the Crown Practice Rules, from the judgment of STUART, J., dismissing an application to quash a conviction made by the Police Magistrate of the city of Calgary upon a charge of keeping a bawdy house and for her discharge from custody under the said conviction.

The appeal was heard by WALSH, SCOTT, and BECK, JJ.

J. McK. Cameron, for the appellant.

James Short, K.C., for Crown.

WALSH, J.:—The application rests upon three grounds, namely: (1) that there was no evidence to shew that the offence was committed in the city of Calgary, the jurisdiction of the convicting magistrate being limited to that municipality; (2) that there was no evidence as to the date upon which it was committed and (3) that there was no, or not sufficient, evidence to justify the conviction.

The only reference in the depositions to the locality in which the offence was committed is that the house in question

was "326-6th Avenue East." Nowhere in them is the city of Calgary mentioned. In addition to the reasons given by the learned judge for refusing to give effect to this objection I think this point is disposed of by the judgment of this court en banc in Rex v. Canadian Pacific Railway Co., 1 A. L. R. p. 341. Stuart, J., in delivering the judgment of the court in that case says: "The information shews that the offence was alleged to have been committed within the province of Alberta and we must presume that it was for such an offence that the defendant was tried and convicted. I do not think, therefore, the court ought particularly when jurisdiction appears on the face of the conviction, to scrutinize the depositions in order to discover an absence of exact evidence to establish local jurisdiction." This statement exactly covers this case for here it is shewn by the record that the charge upon which the woman was being tried and to which she pleaded was for an offence alleged to have been committed in the city of Calgary and it was of that offence there committed that she was convicted as appears on the face of the conviction. Upon the second ground I think it quite clear from the depositions that the date to which the evidence is directed is the day before that upon which the evidence was taken, namely, the 16th of September, 1914, which is the date mentioned in the charge and in the conviction. In addition to the references to the evidence under this head which my brother Stuart gave in his reasons for judgment I think that the statement of the witness W. E. Turner, one of the detectives under whose directions the raid was made, in answer to a question as to why this house was raided, "I know we made an effort to catch it yesterday" plainly refers or at any rate justified the magistrate in inferring that it refers to the events in which the two Turners and Ogden took part which resulted in the procuring of direct evidence against the appellant and the subsequent raiding of the house. This meets also, I think, Mr. Cameron's objection that the references in the deposition to "yesterday" might mean a time later in the day than the hour at which this evidence was procured and the raid was made.

As to the third ground, in my opinion the one act of sexual intercourse which the evidence shews to have occurred in this house coupled with the statement which the witness Ogden swears that the appellant made to him that "she had

not been doing this over three or four days" afforded sufficient proof if believed by the magistrate to stamp her house as a bawdy house. The reference in this statement is obviously to business of the character of that which the appellant and the witness were then negotiating and is an admission upon her part that for three or four days before the 16th of September she had been engaged in carrying on that kind of business. I do not think there is any evidence of the general reputation of the house but there are other facts, such as the finding in the house of all the accessories of such a a trade, which coupled with the proof of the one act and the appellant's admission constitute sufficient evidence of the character of the house to justify the conviction.

The appeal is dismissed with costs.

BECK, J.:—Had this been a case in which the conviction was invalid on grounds which might be met under sec. 1124 of the Code by amendment, where the court or judge upon a perusal of the depositions is satisfied that an offence of the nature described in the conviction has been committed, over which the justice had jurisdiction. I should, had it come before me in the first instance, in all probability, have refused to amend on the ground that though the magistrate was satisfied I was not.

The evidence at best is slight and inferential, and depends on the evidence of disreputable witnesses, who out of their own mouths admit the practice of immoral methods in connection with the case. The principal witness is one Ogden. He was employed by the Calgary police, paid for his services, and provided with money for his out of pocket expenses. He went to the accused's house, says he had sexual intercourse with her, and paid her $3. He had been, it is stated in the evidence, supplied with "marked money."

Another witness is Detective Turner, who sent Ogden to the accused's house. Turner and another constable say they waited outside the house till Ogden came out. Then they indicate that they made a pretense of arresting Ogden as a frequenter and took him back to the house. There they searched for the marked money and could find none. The magistrate's decision rests wholly on the evidence of these three men—men of no moral sense adopting, according to their own account, immoral and disreputable methods. And

their evidence, such as it is, goes only to one act and a very ambiguous statement of the accused. The three witnesses are, on their own admission, participes criminis with the accused, and for my part I should not be ready to take their uncorroborated story. I had, in a former case, occasion to comment on the same methods being used by the Calgary Police Force. See Rex v. Miller, 25 W. L. R. 296. I there said, in referring to a result unfavourable to the prosecution "If that is the result, I shall have no regret. I say this because of what I look upon as irregular, immoral and disreputable methods adopted by members of the city police of Calgary to procure evidence on which to obtain a conviction. They employed two men, residents of Calgary, one a married man, for their purpose. These two men picked up two street walkers whom they had seen going in and out of the house; arranged to go to the house with them; each of these men paid $1.50 for a room, to which they each took one of the women to whom they each paid $3 for actual prostitution; and it is quite clear, from these men's evidence, that they expect not only payment for their services but a refund of their expenses. Their employers must at least have had a pretty correct surmise of the methods they would employ."

My former criticism has evidently had no influence upon the Calgary Police, who continue the hypocritical and pharisaical pretence of being zealous in extirpating public vice by the secret adoption of the same vices.

It is time, in my opinion, that the Mayor and Council of Calgary, as representing the citizens generally, should publicly say whether they intend to tolerate such methods.

As the conviction is valid on its face and the evidence is sufficient to justify the magistrate in convicting I regret that I have to concur in the dismissal of the application.

SCOTT, J., concurred with WALSH, J.

Appeal dismissed.

MANITOBA.

MATHERS, C.J.K.B. JANUARY 19TH, 1915.

CHAPMAN v. PURTELL.

Moratorium Act—Secs. 2, 3, 4—Construction—"Instrument Charging Land with Payment of Money"—Registered Judgment.

Held, that a registered judgment is not an instrument charging land with the payment of money within the meaning of sec. 2 of the Moratorium Act.

Knight v. *Farrell* (Man.) unreported, followed.

Ledoux v. *Cameron* (Man.), 7 W. W. R. 687, not followed.

A motion for final judgment in an action brought to sell land under a judgment recovered in the County Court on the 16th day of July, 1913, amounting to $526.25. On the 16th day of August, 1913, a certificate of the judgment was registered in the Winnipeg Land Titles Office, in which district the lands sought to be sold are situate, and this action was begun on the 30th day of October, 1914. The relief prayed is that the judgment be declared a lien and charge upon the lands and that they may be sold to satisfy it.

MATHERS, C.J.K.B.:—The plaintiffs are entitled to the relief claimed unless their right is taken away or suspended by the Act, familiarly known as the Moratorium Act.

The Act is not a model of perspicuous legislation and I am not surprised that judges have differed as to its meaning. Thus I find that my brother Galt on the 5th November last, in an unreported case of Ledoux v. Cameron, decided that judgment when registered under the provisions of the County Courts Act respecting the registration of judgments is an "instrument charging land with the payment of money" within the meaning of sec. 2. He consequently held that the learned Master was right in refusing to settle an advertisement for sale of lands pursuant to a final order for sale thereof made on the 28th May, 1914, several months before the Act was passed, in an action brought to sell the lands charged by a judgment recovered and registered in March, 1913.

On the other hand, my brother Curran, on the 30th October last, in Knight v. Farrell, also unreported, refused upon motion of the defendant to restrain the plaintiff from proceeding to a sale of the lands bound by a county court judgment under exactly analogous circumstances.

These two decisions are directly in conflict. I have, therefore, no alternative but to examine the matter for myself and to follow the decision which appears to me to be the sounder in principle.

I entirely agree with the opinion expressed by my brother Galt in Fisher v. Ross, 24 M. R. 773, 29 W. L. R. 753, that this Act does encroach on the rights of the subject and ought therefore to be construed in such a manner as not to interfere to any greater extent that is expressly, or by necessary implication, provided.

If the plaintiffs' right of action is stayed, the inhibition must be contained in the first part of sec. 2. That section says, "Notwithstanding any provision in any mortgage of land or agreement to purchase land or in any other instrument charging land with the payment of money, not including liens under the Mechanics and Wage Earners' Lien Act, no proceedings for the sale of any land under any power of sale contained in any such instrument or otherwise existing for default in payment of any such moneys shall be taken by or on behalf of the mortgagee, vendor or other person to whom such money may be payable until after the lapse of six months from the 1st day of August, 1914, if such default took place on or before that date, &c." In the present case the default manifestly took place before the 1st of August last and, if the Act applies, the plaintiffs' motion for judgment must be refused.

It is now settled law that the title of a statute is an important part of the Act itself and may be referred to for the purpose of ascertaining its general scope: Maxwell on Statutes, 67. This Act is entitled "An Act respecting contracts relating to land." In an Act so entitled one would not expect to find provisions dealing with the statutory lien upon lands which a judgment creditor has acquired by registering his judgment; because, although a judgment is spoken of as a contract of record, it is not a contract at all in the sense in which that term is ordinarily used and understood, much less is a judgment for the recovery of money a "contract

relating to land." Such a judgment in no way relates to land.

Then do the provisions of the Act extend beyond its scope as indicated by its title? If an action to sell land under a registered judgment is stayed by the first part of sec. 2, it must be because such a judgment is either a "mortgage of land" or an "agreement to purchase land" or another "instrument" charging land with the payment of money.

Obviously, I think, a registered judgment is not a "mortgage of land" or "an agreement to purchase land" within the meaning of the Act. If covered by the Act at all it must be because it comes within the words "other instrument." The general rule of construction is that a general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words; or, in other words as comprehending only things of the same kind as those designated by them, unless, of course, there is something to shew that a wider sense was intended: Maxwell on Statutes, 5th ed., 538. A judgment in its widest sense is an "instrument;" but is it an instrument of the same genus as a mortgage of land or an agreement to purchase land? Both of those instruments come into existence by agreement of the parties; but that is not the case with a judgment, which comes into existence by the action of a court and, in the great majority of cases, contrary to the will of one of the parties at least. But it may be said that when a certificate of the judgment is registered, from that time the judgment binds and forms a lien and charge upon the lands of the judgment debtor "the same as though charged in writing by the judgment debtor under his hand and seal." The "instrument" referred to in sec. 2 is one which by virtue of a "provision" contained in it forms a charge upon land. A judgment for the payment of money contains no such provision, neither does the certificate which is registered. The charge arises not because of any provision in either the judgment, the certificate or the memorandum of registration made by the registrar, but by virtue of the artificial effect which the statute gives the judgment in consequence of the registration of the certificate. Without the statute the registration of a certificate of the judgment would be ineffectual to create a charge upon the debtor's lands. It requires the

concurrence of the three things, the judgment, the certificate and its registration, plus the statute to obtain that result.

An involuntary charge upon land which comes into existence in this way and is indebted for its effect and operation to such a combination of circumstances, is to my mind not an "instrument" at all, much less is it an instrument of the same kind as a mortgage of land or agreement to purchase land as these terms are used in sec. 2 of the Act.

Then again, the object of the section is to restrain the exercise of the power of sale contained in an instrument charging land with the payment of money or otherwise existing "for default in payment of any such moneys." That language implies that a time for payment has been fixed by the instrument creating the charge. In the case of a judgment the default must necessarily have occurred before the judgment was recovered. The subsequent registration of a certificate of judgment is merely the pursuit by the creditor of one of the remedies which the law provides for the default in payment which took place prior to the recovery of the judgment.

It seems to me that the whole scope of this Act, including its title, indicates that the Legislature was dealing with mortgages, agreements and other instruments creating rights against land by the act of the parties themselves and not with rights which owe their existence to operation of law alone. To interpret the Act otherwise would, in my opinion, be giving it a very wide, and not a strict, construction, as the law requires. Every part of the section can be given full effect by interpreting it in the sense I have indicated. The words "or any instrument charging land with the payment of money" may well have been inserted to include a document that was neither a mortgage in the strict sense, nor an agreement to purchase land; but which created a lien upon land to secure the payment of money. There might not be in such a document a power of sale, but the Act refers to a power of sale contained in the instrument or "otherwise existing." These latter words would include the inherent power of the court to order a sale of the land to realize such a lien.

There is nothing, it appears to me, in sec. 4 of the Act that stands in the plaintiff's way. The first part of that section prohibits the bringing of an action "to enforce a

covenant or agreement to pay money contained in any such instrument"; that is, contained in such an instrument as is referred to in sec. 2. It is clear that a judgment does not contain a covenant or agreement to pay in the sense in which the terms are used here. But, even if it did, the prohibition is against bringing an action until the lapse of six months after the happening of default. In this case the default in payment had occurred considerably more than six months before action. The remaining part of the section says "and proceedings to enforce payment by writ of execution or registration of certificate of judgment 'in any such action' now pending wherein final judgment has not been entered before the 1st of August, 1914, are hereby stayed for a period of six months from the coming into force of this Act, if the judgment recovered include the principal money secured by such instrument or any portion thereof." The words "any such action" manifestly refer to the action mentioned in the first part of the section, namely, an action brought to enforce a covenant or agreement to pay money contained in any such instrument. The plaintiffs' action is not an action brought to enforce a covenant or agreement to pay money contained in any such instrument.

With the greatest deference for the opinion expressed by so careful and painstaking a judge as my brother Galt, I am of opinion that the word "instrument" as used in sec. 2 of this Act does not refer to a registered judgment for the payment of money, and that, therefore, there is nothing to stay the plaintiff's action, and he is entitled to judgment cmfwyz prayed with costs.

Section 3 only applies to actions upon such "instruments" as are referred to in sec. 2. It follows that the time hitherto allowed for redemption in an action such as the plaintiff's is unaffected by the Act.

ALBERTA.

BECK, J. JANUARY 16TH, 1915.

GREGOIRE v. MARKHAM CO. LTD.

Execution—Rule 359—Cheque Issued by Sheriff in Favour of an Execution Debtor — Seizure before Delivery — Validity.

A cheque of a sheriff in favour of an execution debtor cannot, under Rule 359, be seized by the sheriff while it remains undelivered in the hands of the sheriff.
***Courtoy* v. *Vincent*, 21 L. J. Ch. 291, followed.**

Stated case.

G. G. Dunlop, for execution creditors.

C. C. McCaul, for execution debtors.

BECK, J.:—The defendants, Markham Co. Ltd., and other creditors, severally obtained judgments and executions against one McDougall. The sheriff made a seizure of a band of horses and owing to the pendency of interpleader proceedings employed the defendants, Markham Co. Ltd., to take care of and feed the horses. In the result the sheriff became indebted to the defendants, Markham Co. Ltd., in the sum of $600 odd. The horses were found to be subject to the executions and were accordingly sold.

The sheriff subsequently issued a cheque in favour of the defendants, Markham Co. Ltd., for the $600 odd; the cheque was never delivered to the company but always remained in the possession of the sheriff. Shortly after issuing the cheque the sheriff purported to seize it under an execution in his hands against the defendants, the Markham Co. Ltd. I have to decide whether the seizure was effective.

I think it was not.

Rule 359 under which the seizure is sought to be supported is as follows:

"The sheriff having the execution, if any, writ of execution against goods may seize any money or bank notes, any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties or other securities for money belonging to the execution debtor," etc.

This is substantially to the same effect as the English Statute 1 & 2 Vict. ch. 110, sec. 12.

The new rule 615 has an important addition to the list of things seizable but is not applicable to the present case as it was not in force at the time of the seizure.

In Courtoy v. Vincent, 21 L. J. Ch. 291; 15 Beav. 48; 51 E. R. 626, it was held that a cheque of the Accountant General in favour of the execution debtor still remaining in the office of the Accountant General, i.e., undelivered to the execution debtor could not be seized by the sheriff under the English Statute mentioned.

The Master of the Rolls said: "I have communicated with the Accountant General and I find that in Watts v. Jefferyes (3 Mac. & G. 372), the cheque had actually been delivered out. I think that a cheque remaining undelivered in the hands of the Accountant General is not the property of the debtor, so as to entitle the sheriff to seize it."

Reference may be made also to Clarke v. Easton, 14 U. C. R. 251.

I think the case of Courtoy v. Vincent meets the present case and I see no reason for not following it. I would, therefore, answer in the negative the question submitted to me, viz.: whether the cheque was under the circumstances capable of being seized by the sheriff under the said writ of execution.

ALBERTA.

HYNDMAN, J. JANUARY, 18TH, 1915.

RUDYK v. SHANDRO.

Elections — Agency — Principles Governing — Petition under Controverted Elections Act, 1907.

The relationship of principal and agent with reference to elections is not to be established upon the ordinary rules governing commercial transactions but more upon the principles governing the relationship of master and servant, and, accordingly, an agent in such a matter may bind his principal by acts which are not only outside the scope of any authority expressly given to him, but which may be directly contrary to the expressed directions of the person whose agent he is held to be.

A petition under the Controverted Elections Act, 1907, filed by Paul Rudyk, one of the defeated candidates in the

election for the Electoral District of Whitford, to avoid the election of the respondent, Andrew S. Shandro, who was returned at the Provincial general elections held on the 17th day of April, 1913, as member for said district.

A. F. Ewing, K.C., C. F. Newell, K.C., and A. Macleod Sinclair, for petitioner.

A. G. MacKay, K.C., for respondent.

HYNDMAN, J.:—The petition contained the usual charges of corrupt practices.

At the trial the following charges were either abandoned or dismissed, namely:

Clauses 3 (b), (c), (d), (e), (f), (h), (k), (l), (o), (r), of particulars and clauses 13 (a) and (c) of the particulars.

As to the remaining charges undisposed of I will first deal with the charges of bribery.

Clause 3 (a) of particulars relates to the payment alleged to have been made by Alexander Shandro, agent and brother of the respondent, to one Mike Dymchuk on the day of the election to induce him to vote for the respondent and to bring voters to poll 17 to vote for the respondent.

It appears that Alex. Shandro was appointed agent in writing for his brother, the respondent, to act as scrutineer or agent at poll 17 on election day. He drove to the home of Wasyl Chlibecki, who lived in this polling division, and slept there the night before election. Alex. Shandro says that he did not know the people in that poll. Chlibecki told Shandro he thought there were some voters in Dymchuk's "corner" who would vote for respondent. Shandro knew Dymchuk six or seven years. Shandro and Chlibecki drove together to Dymchuk's place early on election day and Alex. Shandro says he asked him if he would take some of the people to the poll on the way. Dymchuk and Chlibecki both say that Shandro paid Dymchuk $3 at the time and Dumchuk says he paid him $2 after the poll closed. Alex. Shandro, whilst admitting that he had the conversation in question and requested Dymchuk to carry some people on the way, denies that he was either asked for or gave him any money at this or any time. Mr. MacKay's student, Howson, who was assisting him in the defence, also testified that

Chlibecki shortly before going into the witness box stated to him in the hallway that Shandro did not pay this money. Chlibecki contradicts Howson. From what I could judge of these witnesses, I am of opinion that there must have been a misunderstanding between them as to the effect of their conversation. Chlibecki did not witness the payment of the $2 and Dymchuk's testimony was not entirely satisfactory as to the exact "spot" where it was paid, but I fail to comprehend why these two men apparently without any interest in the case or any antipathy towards respondent should come forward and testify to the payment in the manner they did. Mr. MacKay contended that it was unreasonable to believe these witnesses because Dymchuk did no work after arriving at the poll as $5 was good pay for a day's work. However, he drove three voters there, and Shandro being a stranger in the locality and it being an unfavourable poll for the respondent, I do not think it extraordinary that Dymchuk did nothing further during the day. He did exactly what he promised in the morning. Taking the whole evidence and the circumstances into consideration I am forced to the conclusion that such payments were, in fact, made.

As to the question of agency, Mr. MacKay argued that the written authority to Shandro to act as scrutineer was a limited one only and the respondent should not be bound by any illegal acts of his outside the scope of such authority. Agency in elections, however, has not been treated in the same manner as in ordinary commercial transactions. In McPherson's Election Law of Canada (1905), at p. 861, I find the following:

"The doctrine has been laid down and is now firmly established that the law of agency which would vitiate an election is utterly different from that which would subject a canditate to a penalty on indictment, and the question of his right to sit in Parliament has to be settled on an entirely different principle. The principle is more on the principle of master and servant than of principal and agent."

"In referring to election matters it may be stated as an axiom that the law of bribery and in relation to corrupt practices is not framed so much with the object of punishing the briber as to secure purity of election."

At p. 862: "Agency in election cases differs from agency in ordinary commercial or other transactions of business, inasmuch as in the case of an election, the agent, constituted by whatever acts are sufficient for the purpose, may bind his principal by acts which are not only outside the scope of any authority expressly given to him, but which may be directly contrary to the expressed directions of the person whose agent he is held to be."

In the matter under consideration we find that, in addition to Alex. Shandro having this written authority, he is the brother of the respondent. He drove a long distance the day before election so that he might act as scrutineer for his brother at poll 17. He did not content himself with merely attending to his duties as scrutineer but shewed his interest in the election on behalf of the respondent by asking Chlibecki if there was anyone he might hire to work for Shandro and to bring voters to the poll. Chlibecki referred him to Dymchuk and they both drove to the latter's house and arranged with him to carry three persons to vote.

These acts and the relationship of the two Shandros, coupled with the written authority as scrutineer, force me to the conclusion that Alex. Shandro was the agent of the respondent in this regard. From the authorities I gather that the relation is more on the principle of master and servant than of principal and agent in the ordinary common law; that agency is a result of law to be drawn from the facts in the case and from the acts of individuals. It is a question for the court whether, upon the aggregate of all these things taken together, of which each in itself is a little, though some, evidence, the person is shewn to have been employed to such an extent as to make him, upon the common sense broad view of it, an agent for whom the candidate would be responsible. See Jelfs' Corrupt and Illegal Practices Prevention Acts, 1883 to 1895, 3rd Ed., pp. 70, 71. I conclude, therefore, that Alex. Shandro was in this instance the agent for the respondent and find the charge proven to my satisfaction.

Paragraph (g) of paragraph 1 of Order, as amended at the trial, charges the respondent with having corruptly paid to Jordia Lastiuka the sum of $10 to induce him to vote for the respondent and to buy drinks for the purpose of induc-

ing electors to vote for the respondent, and at a later date a further sum of $10 for a like purpose, etc., etc.

Lastiuka testified that he knew Shandro and met him before the election in Vegreville. He promised to have a meeting in the deponent's district; Lastiuka asked the respondent to give him some money to spend among his friends; he wanted the money to buy drinks and meals. Shandro gave him $10, in the hotel at Vegreville, part of which he said he spent in treating farmers from his district. Respondent asked him to call a meeting and handed him some bills to put up throughout the locality. Lastiuka accordingly advertised the meeting and posted up the bills. On the night of the meeting Lastiuka asked for pay for the work he had done and Shandro gave him $10. Witness demanded $15 but was refused the extra amount and was told $10 was sufficient. Respondent admitted making both payments but says that about two months previously in Edmonton Lastiuka handed him $10 to pay his school taxes for him, which Lastiuka admits, and Shandro now contends that he did not pay these taxes and when he handed the first $10 to him it was merely a return of this sum. Respondent admitted, however, that at the time of the payment in the hotel nothing was said about taxes and, according to Lastiuka, the first time he heard of this was after the election, (the exact time being very uncertain) when Shandro told him this $10 was the tax money which he had held.

If this was respondent's intention at the time, I think, under the circumstances, being a candidate, and knowing the law with respect to bribery, as a prudent man he should have made it abundantly clear at the time that this was a return of the tax money. I do not think the witness would have been quite so generous in treating the farmers if he had understood it was his own money; the fact, too, that respondent trusted him to call a meeting, post up his bills, etc., shews that he was considered of some value as a worker and supporter, and therefore, in the absence of a clearer explanation, I am bound to hold that this payment was made for the purpose of influencing Lastiuka in the election.

As to the second $10, although under the Election Act it was illegal for the respondent to make the payment except through his official agent, still I am of opinion that the remuneration was fair and reasonable for the work which wit-

ness had done in calling the meeting. The effect of the payment made personally by the candidate I will deal with further on.

Clause 3 (i) and (j) of particulars.

That on the 5th April, 1913, the respondent corruptly paid Onysko Scheramata $10, to induce him to vote for him and to induce others to vote for him, and that on the 10th April, 1913, respondent promised to pay said Scheramata $5 per day for assisting him in his election, and later, namely, in the month of July, 1913, in pursuance of said promise, the respondent paid Scheramata the sum of $40.

Payment of the sums is admitted by the respondent but he contends that it was in respect of lawful expenses and that his only offence was that of paying directly moneys which, by sec. 293 of the Election Act, should have been paid by or through his official agent.

The evidence, in effect, is as follows: The parties met in the Alberta Hotel, Vegreville, on the 5th April. Shandro told Scheramata that he wanted him to drive speakers for him during the election to such places as might be indicated from time to time. Scheramata was to be paid $5 per day, and on being asked if he had any money replied he had not, and Shandro advanced him $10. He says this money was to pay for meals, etc., and that he kept an account of it, which came to more than $10, but did not receive the difference from Shandro. The only work he did was driving speakers about the riding. He never drove Shandro himself, but went where he was directed with supporters. He did not work continuously, and says that the eight days at $5 included election day. Now it appears that he had considerable difficulty in collecting the debt. He never rendered any itemised account but merely claimed $40 for eight days' driving at $5 per day. Having failed to collect from Shandro, on the 4th July, 1913, the claim was placed in the hands of Ewing & Harvie, solicitors, who wrote a letter to respondent threatening that unless the amount was paid by return mail a writ would be issued against him. On receipt of this demand Shandro, on the 26th July, 1913, paid Scheramata personally by cheque on the Merchants Bank of Canada, Vegreville branch, on which is written, "in full payment hire rigs eight days at $5."

Scheramata says that in April there was nothing said as to how electors should vote, that he was not asked to do

anything except drive Shandro's agents wherever he was ordered. There is no evidence whatever that this money was paid for any other purpose than stated. He did the work he agreed to do and I am of opinion that the remuneration for a man and team at $5 per day under the circumstances was fair and reasonable.

Mr. Sinclair, laid stress on the fact that Scheramata testified that the eight days included election day. However, I am satisfied that Shandro believed Scheramata actually did drive eight days excluding election day and, according to the evidence, Scheramata did no work that day. He merely voted and on his way to the poll "picked up" John Scheramata and on his way home drove the returning officer. As John Scheramata was an Edmonton man having no vote in Whitford constituency I cannot see anything in the evidence which would amount to proof of the charge of conveying voters to the poll.

I conclude, therefore, that, so far as this clause is concerned, there was no corrupt intent on the part of the respondent but that his offence consists in a breach of sec. 293 of the Election Act.

Clause 3 (m) of particulars, that the respondent on 2nd April, 1913, at Vegreville, corruptly paid to one Elarian Mandryk the sum of $10 to induce him to vote and to induce others to vote for the respondent.

I am not satisfied with the evidence of the witness Mandryk. He swore that Shandro paid him $10 in the hall near the water closet of the Alberta Hotel for the purpose of "making him silent" as he had been working for the petitioner. He testified that Shandro said, "Take this and don't talk against me among the people, neither for or against me." After this he worked for Rudyk for eight days at $5 per day and said nothing to Rudyk about Shandro's payment until after election day.

Shandro emphatically denies this payment. He says he never had anything to do with Mandryk that day; that witness never asked him for money and that he never gave him any.

Now, even if the above were all the evidence on the point I do not think I would be justified in deciding against respondent, but on cross-examination Mandryk admitted that about two weeks prior to the trial he stated in the presence

of Michael Ostrowsky, Alex. Shandro, Nick Boychuk, and the respondent that he did not receive the money in question. This statement was reduced to writing and witnessed by the three parties above mentioned. Although Mandryk denies signing the paper he admits that it contains what he actually stated. All the others say that he did in fact touch the pen. On being asked why he told a different story he answered that he was not at the time on oath and that now, having been sworn to tell the truth, he would do so. I think, therefore, in view of these events, I would be placing a premium on falsehood if I were to accept the evidence of such a witness as Mandryk, especially in view of Shandro's contradiction, and accordingly find the charge not proven.

Clause 3 (p) of particulars as amended is to the effect that respondent did pay to one Solowan $5 per day for driving during the election, etc.

I find that the expenses incurred were legal expenses, that the respondent paid $25 personally and that his offence consists only in paying directly that which should have been paid through his official agent, and my general remarks hereafter will apply to this charge.

Clause 4 (a), (b), and (d), and clause 12 (i) and (j) of particulars charge the returning officer, William Hawilliack, who is a brother-in-law of the respondent with instructing persons to pull down and himself pulling down pictures and literature posted up by the petitioners, etc.

The evidence on these charges is meagre and very unsatisfactory, and, without dealing with the legal effect of such acts, if proven, I unhesitatingly dismiss the petition so far as they are concerned.

Clause 5 (a) of particulars. This charge is to the effect that poll 16, Soda Lake, did not open until about 9.45 a.m. on election day, that the deputy returning officer and poll clerk were not sworn as required by law; that the deputy returning officer did not shew the ballot box to such persons as were present at the polling place so that they might see that same was empty, as required by the Alberta Election Act.

The evidence is clear that the poll did not open until between 9.30 and 9.45 a.m. owing to a misunderstanding on the part of the deputy returning officer as to where the poll should be held, but with the exception of this I find

everything else was quite regular and the respondent and his agent innocent of any complicity in the matter. I am satisfied that the delay in opening this poll had no material effect on the general result of the election. There were fifty-one voters on the list, forty-six of whom voted, and the petitioner had a majority of twelve over respondent, the vote standing as follows: Connolly, 2; Rudyk, 27; Shandro, 15, and two rejected ballots.

Clause 5 (b) of particulars: That at poll 15, Hairy Hill, no poll was held on election day and no votes were taken although many electors attended for that purpose and were prevented from voting by reason thereof.

There is no dispute as to the facts. It appears that the key of the ballot box became lost. No one present seemed to have courage enough to open it in any other way and consequently no votes were taken at this poll. I find, however, that respondent was not responsible in any way and that there was no wilful intent on the part of anyone concerned. I am of opinion that this event had no material effect on the result of the election. The number of voters on the list was 42, whereas the final majority for respondent over petitioner in the election was 187. Of course, it might be possible for more than 42 to vote under the provisions of the Election Act which permits persons not on the list but who are nevertheless entitled to vote to do so by taking the necessary oath. But on examination of the statement of the returning officer, form 51, sec. 233, of the Act, I find that the average vote in each poll was 55 and that the highest number at any poll was 97; moreover that the greatest number of names on any polling list in the district was 126. It is to my mind, therefore, quite improbable that the final result would in any way have been effected even had this poll been regularly held and every legitimate vote in the division voted in favour of the petitioner.

Clause 6 (a) of particulars: This relates to three voters, George Danyluik, N. Gazliuk and George Kutosch, who, it is alleged, voted at poll 9 and were not duly qualified electors.

There is no evidence as to how they voted or that the respondent was in any way connected with them. There is also some doubt as to whether they knew they were not entitled to vote. The witness Kutcher himself admitting that although he was scrutineer for Rudyk he was not sure

of the boundaries of the district. I conclude therefore as to this that no corrupt practice has been proved as against the respondent or his agents.

Clause 3 (n) of particulars: That John Scheramata, agent of respondent, corruptly offered $200 to Zenko Mytkytka to induce him to vote for respondent, and to stay away from poll 7 on election day.

At the conclusion of the evidence on this charge I intimated I believed no real or serious offer had been made, and I am still of that opinion. The chief witness for the petitioner himself admitted that he and Scheramata were more or less chaffing one another and that he regarded the occurrence merely as a "joke." I therefore dismiss this charge.

Clause 14 (a) of particulars charged that respondent instructed the enumerator of poll 8 to mark the names of four electors off the list because he anticipated that such persons intended not to vote for respondent.

I find from the evidence that two of these, viz.: Wasyl and Fedor Ungorian did not live in the Whitford riding and the enumerator was justified in striking their names off the official list. I do not think that Shandro attempted to press the enumerator to do anything improper and believed that some or all of these persons were not entitled to vote in the constituency. I therefore dismiss this charge.

Clause 17 (a) of particulars: This alleges that the respondent was and is disqualified from being a member of the Legislative Assembly of the Province of Alberta in that he is not a British subject.

The evidence adduced in connection with this charge proved to be rather peculiar and interesting.

It appears that respondent was born in Austria on the 9th March, 1884, emigrated to Canada with his father, Steve Shandro, about the year 1899 and settled in the district where he now lives. On the 31st day of October, 1904, he went through the usual formalities leading to his naturalization and subscribed the usual affidavits before Mr. C. W. Cross, Commissioner in and for the North West Territories and certificate of naturalization was issued on the 8th day of February, 1905. At this date, therefore, respondent would be about one month under twenty-one years of age. If these were the only facts incidental to his status as a British sub-

ject it might be necessary for me to decide whether or not the said certificate of naturalization was valid because Shandro was at the time under twenty-one years, but evidence was adduced proving that Steve (or Stefan) Shandro, father of respondent, became a naturalized British subject on the 3rd day of October, 1903. Respondent lived with him after that date and before he became twenty-one years of age and therefore, under the Naturalization Act, was already a British subject and became such before he attained his majority and his own certificate was, therefore, superfluous. Section 35 of the Naturalization Act, R. S. C. ch. 17, reads as follows:

"If the father, or the mother being a widow, has obtained a certificate of naturalization within Canada every child of such father or mother who during infancy has become resident with such father or mother within Canada shall within Canada be deemed to be a naturalized British subject."

This complaint is therefore dismissed.

Clauses 4 (a), (c), (d); clauses 10 (a); 11 (a); 12 (a); 12 (a), (b), (c), (d), (e), (f), (g), (n), (j); 13 (b), of the particulars: These charges relate to the arrest of the petitioner at the instance of the respondent the night previous to the election, viz.: on the 16th day of April, 1913, and that respondent and his agents advised and warned electors not to vote for petitioner because he was in gaol and to vote for him would be useless. The facts are substantially as follows:

It appears that on the 25th March, 1913, the Honourable C. W. Cross, Attorney-General, wrote a letter to the petitioner, copy of which is as follows:—

"Personal.

Dear Sir,—If you are desirous of having any appointments made of Justices of the Peace, Notaries or Commissioners in connection with my department during the election, kindly wire to me at Government offices, Edmonton, and the appointment will be attended to at once by Mr. Thom.

Wishing you every success in the coming election and with best regards,

I am, yours very truly,

(Sgd.) C. W. Cross.

Paul Rudyk, Whitford, Alberta."

The petitioner did not receive this letter until about a week before election whilst he was passing through Whitford Post Office district. It appears the petitioner had been a friend of the Attorney-General for a long time, was an active Liberal and supported Mr. Cross in his several elections in the City of Edmonton, that the petitioner intimated to the Attorney-General before the letter was written that he intended being a candidate and states that Mr. Cross wished him every success.

At a Liberal convention held on the 29th March the respondent was nominated as the Liberal candidate for the Whitford riding. Certain friends of the petitioner also wished to nominate him but he refused to allow his name to go before the convention and stated that he proposed running as an Independent Liberal, and from that time onward was active in promoting his interests as a candidate throughout the locality.

The nationality of the majority of the electors in the district was that of the parties hereto, either Austrian or Russian, and although there were also two English speaking candidates, Hughson and Connolly, it was conceded that only one of foreign birth would have any great hope of success and the real contest was conceded to be between petitioner and respondent.

About the 13th of April the petitioner read and interpreted the letter referred to at a meeting at which Andrew Shandro was also present. Respondent asked to see the letter, which Rudyk shewed him and he carefully read it and understood contents. It appeared from the evidence that Rudyk's object in using this letter was to lead the people to believe that he was a friend of the Attorney-General and that if elected to the Legislature he would have quite as much influence with the Government as the regular Liberal nominee, Shandro, and there is evidence to the effect that he boasted to some extent that the respondent could not produce such a letter from any member of the Cabinet. The respondent, evidently, was much concerned about the effect the letter would have on the minds of the electors and, not being able to understand why the Attorney-General should favour one who was not the regularly nominated Liberal candidate, on the 15th of April had a telephone conversation with Mr. Cross with regard to it. He was informed by

Mr. Cross that no such letter had ever been written, that he had had no correspondence of any nature with Mr. Rudyk for a number of years and he could not possibly understand how he had such a letter in his possession. With this assurance from Mr. Cross, the respondent conceived the idea of putting an end to the effect of it by procuring Rudyk's arrest on the charge of forgery and by means of a search warrant getting the letter away from him, and to that end sent for Robert Stewart, a Justice of the Peace living about ten miles distant, asking him to come to respondent's house, which Mr. Stewart did.

As a matter of fact, the letter was a genuine one signed by Mr. Cross himself but which evidently for some reason or another at the time of the telephone conversation he had forgotten, and it was quite proper for the petitioner to use the letter in any legitimate way.

On arrival at Shandro's residence the Justice of the Peace found also present one Mike Ostrowsky and others. Mike Ostrowsky, although a resident of Edmonton, appears to have been a very active worker in this district in the interests of Shandro. He was connected with a newspaper called the "Russian Voice" and took a very active part in the scheme to have Rudyk arrested and the letter rendered useless by means of a search warrant.

In fairness to the Justice of the Peace, who was also an active agent of Shandro, I must state that he advised against such a proceeding but without effect.

On the afternoon, therefore, of that day an information was laid by respondent in part as follows:

"That Paul Rudyk of Edmonton, Alberta, on or about the 13th day of April, A.D. 1913, at Edward in the said Province did unlawfully forge a letter signed C. W. Cross, Attorney-General of Alberta, or did have a letter in his possession alleged to have been signed by C. W. Cross, said letter if signed by C. W. Cross is a forgery. Said C. W. Cross stating so; said C. W. Cross states said letter never signed by him."

And a warrant to apprehend and warrant to search were issued, the warrant to search reading in part as follows:
"that there is reason to suspect that Paul Rudyk of Edmonton has in his possession a letter signed 'C. W. Cross, Attorney-General' alleged to have been forged, Mr. C. W. Cross stated never wrote said letter."

Evidently Shandro had some misgivings as to the genuineness of Mr. Cross' letter because it was arranged that the arrest should not be made unless a telegram was received at Pakan from Mr. Cross confirming the telephone conversation and which he promised to send that day. As respondent was due at a meeting in the evening at a point a considerable distance from his home he drove away with one Rudimer Pratish about four o'clock in the afternoon, leaving Stewart and Ostrowsky in the house. It was arranged that the warrants should be delivered by Constable Schreyer, of the North West Mounted Police, with instructions that he should arrest Rudyk only on condition that the expected telegram came to Pakan from Mr. Cross, Ostrowsky and Stewart drove off with the papers and placed them in the hands of Mr. Schreyer on the above conditions. Whether or not Schreyer got the expected telegram, it is not clear, but at any rate, that same night at the conclusion of a meeting Rudyk was holding at Smoky Lake school house with seventy-five or eighty people present, just after he finished his speech Constable Schreyer appeared and demanded the letter, which petitioner gave him. The constable placed it in his pocket, shewed him the warrant and placed him under arrest.

It appears Schreyer's intention was to take him to the home of Stewart, a very long distance away, but at the request of the petitioner instead he was taken to Dr. Lawford, J.P., at Pakan, as he was the nearest magistrate. They arrived at Lawford's house about three o'clock in the morning. As there was no accommodation for prisoners, he sent them to the hospital till the morning, when he released the petitioner on his own recognizance till the 18th of April, and Rudyk was thus enabled to be present about the opening of the Pakan poll and was also at Smoky Lake poll about one of two o'clock p.m. On the 18th April Dr. Lawford further adjourned the case for one week in order to receive the information from Stewart, J.P., and Shandro was notified of this adjournment. At the end of the week Rudyk was telephoned to not to attend as Lawford had failed to receive the papers from Stewart and the case was further postponed to the 28th of the month. Although Shandro was duly advised of these dates, he did not appear and on the 28th the charge was formally dismissed by the justice for want of prosecution.

There is a feature of the case which deserves some attention and, to my mind, has a very great bearing on the attitude of mind and motives of Shandro and Stewart. There were, apparently, no instructions whatever given to the constable as to where petitioner should be taken after arrest. Under ordinary circumstances he would be brought before the justice who issued the warrant and the constable proposed doing that and no doubt would have done so had not Rudyk urged otherwise. Stewart, on the eve of the election, instead of remaining at home, went to a poll ten miles distant so that if the constable had done the usual thing and taken him before the issuing magistrate he would have found on arrival that he was not available which, no doubt, would have meant the detention of the petitioner during the whole of the seventeenth and thus deprived him of any work which he might have done in the support of his candidature on this important day.

The only commendable thing on the part of the respondent in this reprehensible affair was his candid confession that in doing what he did he was not acting in the public interest or with a view of assisting in the administration of justice but simply and solely with the object of futhering his own election. As he said, "The main object in arresting Rudyk was to stop Rudyk taking away my votes."

Although there is evidence that Shandro believed the Cross letter a forgery, still, seeing, as he did, the official letter head and every appearance of genuineness on the face of the letter, for decency's sake at any rate or as a generous and, I might say, sportsmanlike opponent, he might at least have postponed the arrest of Rudyk until after election day as he must have known that Rudyk was a man of substance, had lived in the country for many years, and had no intention of departing from the province.

The petitioner contends that this action on the part of Shandro and the advise or warnings not to vote for him had a very detrimental effect on his election in that many persons would be confused and misled and would not know what effect, if any, such arrest would have if he were elected and that a large number of electors would naturally be prejudiced by reason of these things. I find it difficult, however, to come to that conclusion. Although the evidence is conflicting, I believe it was a well known fact and was dis-

cussed by electors at a number of polls that Rudyk had been arrested. In fact, at Smoky Lake school the night before election he was arrested immediately at the conclusion of the meeting and there must have been some persons who witnessed this. Granted that even only one person knew it at the time, it is reasonable to suppose that news of such an occurrence, affecting as it did one of the principal candidates would spread very rapidly in that mysterious manner which such news does and there is no telling where the reports would end. However, I was rather surprised that no evidence was given by any witness to the effect that a single elector had been influenced by the knowledge or report of the arrest. If anyone did vote against or refrained from voting for Rudyk on this account it is strange that some elector was not brought forward to state the fact at the trial of this petition.

I do not think it falls under the head of intimidation or undue influence either at common law or under sec. 26 of the statute unless, at any rate, it could be proven that it did actually operate to intimidate or restrain from voting some one or more of the electors in the district.

I therefore come to the conclusion that, reprehensible as the conduct of the respondent was in this regard, I do not think, on the evidence, that it amounts to any of the matters contemplated by the Elections Act as a cause for declaring the election void.

Referring to the payment of legitimate expenses made personally by respondent but which, nevertheless, under the Elections Act are not permitted but must be made by the official agent, in my opinion these offences do not fall under the head of corrupt practices but are merely prohibited acts. No penalty or punishment is prescribed in the Elections Act for the commission of this offence and would, therefore, I presume, be subject to the punishment prescribed by the Criminal Code which deals with offences against provincial statutes, for which no punishment or penalty is prescribed.

So far as these offences are concerned, therefore, I conclude that, in themselves, they do not constitute a ground for avoiding the election.

As a consequence, therefore, of my findings as to the payments made to Mike Dymchuk by Alexander Shandro, agent of the respondent, and the payment to Lastuika made

by the respondent personally, and other findings, it is my duty to declare the said election void, and as a further result of such findings, the said respondent, Andrew S. Shandro, is therefore incapable during the next eight years of being elected to or sitting in the Legislative Assembly or any municipal council and of being entered on the voters' list or registered as a voter and of voting at an election and of holding any office at the nomination of the Crown or any municipal office.

The petitioner shall have his general costs but shall not be entitled to tax the witness fees in connection with such charges as have not been proved at the trial.

SASKATCHEWAN.

JANUARY 9TH, 1915.

SUPREME COURT EN BANC.

LANDES v. KUSCH.

Vendor and Purchaser—Agreement for Sale of Land—Open Contract — Purchase-Money Payable by Instalments — Default—Acceleration—Remedies of Vendor — Personal Judgment Sought — Pleading — Averment of Title and Readiness to Convey Necessary—Rule 154.

Possession of title by a vendor suing for the balance of the purchase-money of land upon an open contract, and his readiness to convey, are something more than conditions precedent within the meaning of Rule 154; they are material facts which go to the root of the action and must be pleaded.

Having pleaded title, the vendor must prove it, at the hearing if the defendant in his pleading questions the validity of his title; if not, it may be proved on a reference.

It is only where defendant admits plaintiff's title, or has by his contract expressly agreed to pay irrespective of title, that a court will decree payment by a purchaser without a good title first having been shewn.

Order of ELWOOD, J., 28 W. L. R. 915, set aside.

The plaintiff's statement of claim sets out that on the 10th day of February, 1913, by a certain agreement in writing, he agreed to sell to the defendant and the defendant agreed to buy the south-west quarter of 7-37-4, west 3rd, for $20,000, payable $500 on the execution of the agreement,

$500 on March 10th, 1913, $4,000 on November 10th, 1913, and $5,000 on the 10th day of November in each of the years 1914, 1915 and 1916. He also alleges that in the said agreement the defendant covenanted to pay the said sums together with interest thereon on the days and times stipulated therein, and further, that it was covenanted and agreed in said agreement that in case of default in the payment of principal or interest or any part thereof due thereunder, the whole of the purchase-money should become due and payable. He also sets out that the defendant had made default in the payment of the $4,000 due November 10th, 1913, and computing the balance of purchase-money and interest due at the sum of $19,886.67. He claims:—

(a) Payment of the said sum of $19,886.67 and interest thereon.

(b) Judgment for the said sum.

(c) In default thereof, that the interests of the defendant in the said lands be foreclosed and the defendant required to deliver up possession of the said lands and premises to the plaintiff.

The defendant filed the following statement of defence:

(1) The defendant admits paragraphs 1, 2, 3, 4, 5 and 6 of the plaintiff's statement of claim herein, and further says that he is unable to meet the payments set out.

(2) The defendant consents to his interest in the lands set out in the plaintiff's statement of claim being foreclosed, and is prepared to deliver up possession of the said lands and premises to the plaintiff herein as the plaintiff claims for.

The plaintiff then moved for judgment on the pleadings. The defendant admitted his right to a foreclosure order, but contended that on the statement of claim as it stood the plaintiff was not entitled to a personal judgment against him. The Local Master before whom the application came, allowed the plaintiff to sign judgment for the amount claimed, and also decreed that in default of payment by October 24th, 1914, there would be foreclosure absolute. From this order, by subsequent leave—although there had been several intervening motions—the defendant appealed, contending, first, that on the pleadings there could not be a personal judgment, and second, that there could not be both personal judgment and foreclosure.

The plaintiff, by notice dated June 22nd, 1914, abandoned that portion of the judgment and order referring to the foreclosure of the defendant's interest in the land, and elected to proceed only on the personal judgment entered against the defendant. The appeal was heard in Chambers before Elwood, J. It was there contended that before the plaintiff was entitled to sign personal judgment he must allege in his pleadings that he had a good title to the land and that he was ready and willing to execute a conveyance thereof in accordance with the contract. Elwood, J., 28 W. L. R. 915, held that the possession by the plaintiff of a good title and his readiness and willingness to convey were conditions precedent which would be implied under rule 154, and therefore it was not necessary to plead them. From that decision the appeal is taken.

The appeal was heard by HAULTAIN, C.J., NEWLANDS, LAMONT, and BROWN, JJ.

J. F. Frame, K.C., for defendant, appellant.

H. V. Bigelow, K.C., for plaintiff, respondent.

LAMONT, J.:—The first question is, are the possession by the plaintiff of a good title and his readiness and willingness to convey conditions precedent within the meaning of Rule 154? The agreement for sale was not made part of the material used on the motion, nor does the appeal book contain any statement as to the terms, if any, set out therein upon which the vendor was to convey. All we know is the statement in the plaintiff's pleading that the plaintiff agreed to sell and the defendant agreed to buy, and the admission by the defendant that such statement is true. We must consider the contract, therefore, as an open one, and deal with the points raised on that basis.

In the edition of the Annual Practice (1915), in a note under English Rule 210, which is identical with our Rule 154, I find the following:

"Cases constantly occur in which, although everything has happened which could at common law prima facie entitle a man to a certain sum of money, or vest in him a certain right of action, there is yet something more which must be done, or something more which must happen, in the particular case, before he is entitled to sue, either by reason of the provisions of some statute, or because the parties have

expressly so agreed; this something more is called a condition precedent. It is not of the essence of such a cause of action, but it has been made essential. It is an additional formality superimposed on the common law. . . . But an allegation which is of the essence of the cause of action is not a condition precedent within the meaning of this rule, and must still be pleaded in the statement of claim."

In Fruhauf v. Grosvenor & Co. (1892), 61 L. J. Q. B. 717, it was held that to maintain an application for final judgment on a dishonoured cheque against the drawer there must be an allegation that notice of dishonour had been given to the defendant. The reason for this apparently is that notice of dishonour is necessary to effect the drawer with liability, and therefore it is more than a condition precedent; it is a material fact of the very essence of the contract.

Under the English Judicature Act, an assignee of a chose in action may, under certain circumstances, sue in his own name. In these cases the statement of claim must contain averments of all facts necessary to bring the case within the section. It must allege an absolute assignment in writing of the chose in action, and a notice in writing to the defendant of such assignment, otherwise action cannot be maintained. Sear v. Lawson, 10 Ch. D. 121; Read v. Brown, 23 Q. B. D. 128. In these cases the assignment and notice thereof are not considered to be conditions precedent which need not be alleged, but are of the essence of the cause of action. In the latter case the question was whether any part of the cause of action arose in the city, and in giving judgment the Master of the Rolls said:

"What is the real meaning of the phrase, 'a cause of action arising in the city'? It has been defined in Cooke v. Gill, L. R. 8 C. P. 107, to be this: every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

Is the possession of a good title by the plaintiff a material fact without which he is not entitled to succeed in the action? In Armstrong v. Nason, 25 S. C. R. 268, the obligations as to title imposed on a vendor of land under a contract to sell are expressed by Strong, C.J., in these words:

"It is an elementary principle that if a vendor contracts to sell land without any saving condition as to the nature of the title he is to confer upon the purchaser, the law implies that it is incumbent upon him to make out a good title in fee simple."

In Ontario it has long been settled law that where the price of land is payable by instalments, the purchaser has a right to have a good title shewn in the vendor before he can be compelled to pay any part of the purchase-money. Gamble v. Gummerson, 9 Grant, 199; Cameron v. Carter, 9 O. R. 426; Thompson v. Brunskill, 7 Grant, 547.

In McCall on Remedies of Vendors & Purchasers, at pp. 11 and 12, the author says:

"Where the price is payable by instalments, it would appear that a right of action arises in respect of each instalment as soon as it becomes due and payable under the terms of the contract. The vendor must, however, in general be able to shew a good title in himself, or that he has the right and is in a position to call in the title if outstanding: in other words, the purchaser cannot be called upon to pay any moneys on the purchase-price unless and until the vendor shews a good title."

The same rule is laid down in Dart on Vendors & Purchasers, at pp. 1001, 1002, where the author says:

"On the other hand, the vendor, if he sue merely on the agreement . . . must have shewn a good title and have executed, or been ready and willing to execute, a conveyance in the terms of the contract."

I am therefore of opinion that the possession of title by a vendor suing for the balance of the purchase-money of land upon an open contract, and his readiness to convey, are something more than conditions precedent within the meaning of Rule 154; they are material facts which go to the root of the action and must be pleaded. If, however, the contract is not an open one, but one in which the purchaser expressly agrees to pay the purchase-money on a day certain, irrespective of title or conveyance, no averments as to this are necessary. Yates v. Gardiner, 20 L. J. Ex. 326.

That the vendor must allege a good title seems to me to be established also by the nature of the action. This action, in so far as the plaintiff seeks to recover the balance of the purchase-money, is simply a vendor's action for specific performance. In McCall's book above referred to, at p. 9, the

author sets out the remedies open to a vendor where a purchaser has made default in the payment of the purchase-money, as follows:

He may:

(1) Sue for the purchase-money.
(2) Sue for damages.
(3) Enforce his vendor's lien.
(4) Sue for specific performance.
(5) Rescind the contract.

But in order to succeed at law under (1) in an action for the purchase-money he must have conveyed the property to the purchaser. In Bullen & Leake, p. 285, note (m), I find the law summarised as follows:

"In order to support a claim for the purchase-price of land sold or assigned, there must have been a conveyance or assignment to the defendant. (East Lambton Union v. Metropolitan Ry. Co., L. R. 4 Ex. 309). A mere giving of possession is not enough. In the absence of conveyance or assignment the claim must be for specific performance or damages."

The same principle is laid down in 25 Halsbury, 489, as follows:

"Hence the vendor cannot recover the purchase-money, notwithstanding that the purchaser has been let into possession, unless the conveyance has been executed; but, on a resale at a lower price, he can recover the difference in price and the expenses of the resale."

The reason for this is that the vendor cannot, apart from contract to that effect, hold the land and at the same time have the purchase-money.

An action for damages would not give the vendor the purchase-money, but only the difference between the value of the land left on his hands at the date of the breach and the price agreed to be paid. The enforcement of his vendor's lien would secure to him whatever he could realize out of the land, and he might recover the deficiency, should there be any; but to obtain judgment for the purchase-price from the purchaser he must sue for specific performance. It is not, in my opinion, very material whether he asks in the statement of claim expressly for specific performance or merely for the purchase-money, for, as pointed out by Stuart, J., in Groves v. Mason, 8 W. L. R. 542, these remedies amount in the end to the same thing. It is, however, im-

portant to realize that the action, in so far as the claim is to recover the purchase-money, is in reality one for specific performance, and carries with it, both as to pleading and the order to be made, the incidence of an action for specific performance. As to pleading, there is no doubt as to what must be set up. In 27 Halsbury, 83, the author lays down the law as follows:

"The plaintiff in an action for specific performance of a contract for the sale of land must plead that he is ready and willing to carry out the contract, and repudiation of the contract by the defendant does not relieve the plaintiff from this obligation."

See also Ellis v. Rogers, 50 L. T. 606.

In order, therefore, to maintain an action for the purchase-price of land, sold under an open contract, the vendor must allege an ability and willingness on his part to perform the obligations resting on him under the contract, in other words, that he has a good title and is willing to convey upon payment.

Having pleaded title, the vendor must prove it. He must prove it, as a rule, at the hearing if the defendant in his pleading questions the validity of his title: if not, it may be proved on a reference, Lord Halsbury, in his "Laws of England," vol. 27, at pp. 83 and 84, lays down the law as follows:

"In actions by a vendor of land to enforce specific performance by a purchaser of the contract for sale, the defendant may succeed at the trial on the ground of a defect in the plaintiff's title, if such defect has been expressly pleaded, or if the objection appears on the evidence at the trial.

"Even though no defect in title has been pleaded, the defendant is entitled to have an inquiry directed as to the title of the plaintiff to the land in question. If, however, he has admitted the title of the plaintiff in his pleading, this is an express waiver which excludes the right to a reference of title."

The same principle is stated in almost identical words in Fry on Specific Performance, 4th ed., p. 563.

It is, therefore, only where the defendant admits the plaintiff's title, or has by his contract expressly agreed to pay irrespective of title, that a court will decree payment by a purchaser without a good title first having been shewn. To do otherwise would be to compel a purchaser to pay the purchase-price and leave him to run the risk of finding, when

he had done so, that the vendor had no title; and where, as in the present case, that has been done, the order cannot be upheld. This is practically what was laid down by this court in Mayberry v. Williams, 3 S. L. R. 350. In that case, as here, the defendant was sued for the balance of the purchase-money. On behalf of the defendant it was argued that the plaintiff's action must fail because he had not before action delivered to the defendant an abstract of title and tendered a conveyance. The trial judge gave judgment for the plaintiff. On appeal to this Court, it was held that the action did not necessarily fail although the plaintiff had not delivered to the defendant an abstract of title nor tendered a conveyance before action, but that the defendant was entitled to a reference as to title. The judgment of the trial judge was set aside, and a reference directed, with leave to the parties to apply after the report on the reference was filed for such judgment as they might be entitled to.

I am therefore of opinion that the order appealed from cannot be upheld, and must be set aside.

In his statement of claim the plaintiff simply asked for judgment, and in default foreclosure. For the reasons I have given, he is not entitled to judgment. He was, however, on the defendant's pleading entitled to an order for foreclosure and possession. This he obtained, but subsequently abandoned. He is entitled on application to have it restored.

The appeal will therefore be allowed, and the order set aside with costs, both of appeal and in Chambers.

BROWN, J.:—I am of opinion that this appeal should be allowed, for the reasons given by my brother Lamont.

HAULTAIN, C.J., and NEWLANDS, J., concurred.

Appeal allowed.

ALBERTA.

JANUARY 26TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

EWING v. McGILL.

Vendor and Purchaser — Agreement for Sale of Land — Repudiation—Practice—Affidavit in Support of Motion Under Old Rule 103—Right to Cross-examine Deponent —Old Rule 293.

An application was made by a vendor under Rule 103 to have the purchaser's appearance struck out and for an order for final judgment in an action brought to recover the amount of the first of the deferred instalments of purchase money under an agreement for the sale of land:—

Held, that the statement of defence setting up that the vendor at the time of the delivery of the said defence had neither the title nor the right to call for the title to the mines and minerals on the said land constituted a repudiation of the said agreement.

Held, that if the vendor as a matter of fact at the date of the delivery of said defence had neither the title nor the right to call for the title to the said mines and minerals, the repudiation of the contract entitled the purchaser to be relieved from further liability under it and that the said liability could not be revived by a subsequent acquiring by the vendor of such title or right to call for it.

Held, that upon the said application purchaser was entitled, under old rule 103, to shew a good defence by the cross-examination of the vendor upon the statement in his affidavit that he was and had been since a specified date, ready, willing, and able to give purchaser a clear title to the said lands including the mines and minerals in and under the same.

Held, although it is within the discretion of the judge, whether or not he will allow a cross-examination upon an affidavit in support of a motion, petition, or summons, under Rule 293, that where the discretion is exercised upon a wrong principle the appellate court may set the matter right.

O. M. Biggar, K.C., for defendant, appellant.

A. M. Sinclair, for plaintiff, respondent.

WALSH, J.:—The plaintiff's action is brought to recover the amount of the first of the deferred instalments of purchase money and interest under an agreement for the sale by him to the defendants of certain land, the agreement containing the usual covenant by the purchasers to pay. It is a purely personal judgment which is sought, no other relief being claimed. Simmons, J., on an application to him under old Rule 103 ordered that the defendant's appearance should be

struck out and that the plaintiff should be at liberty to enter up final judgment for the amount claimed with costs. From this order the defendants appeal by leave of the learned judge who made it. The only ground of appeal argued before us was that on the hearing of the application upon which the order was made the defendants were improperly refused the right to cross-examine the plaintiff on his second affidavit filed in support of the motion.

The summons was issued on the 5th of June, 1914, on an affidavit of the plaintiff which after proving the agreement and the defendant's default contains the following paragraph:—

"4. I am able, ready and willing to give a transfer of the lands mentioned in the said agreement to the defendant on payment of the total sums due by them under the agreement."

The agreement which was made an exhibit to this affidavit contains a covenant on the part of the plaintiff that he would on payment of the purchase money and interest transfer the lands to the defendants "subject to the conditions and reservations in the original grant thereof from the Crown." The defendants before the return of the summons delivered their statement of defence and counterclaim containing the following paragraphs:—

"6. In the alternative, the defendants state that the plaintiff agreed to transfer to the defendants, upon payment of all sums due on the said agreement, the said lands by good and sufficient transfer free and discharged from all encumbrances but subject to the conditions and reservations in the original agreement from the Crown.

"7. The plaintiff is not the registered owner of the said lands free and discharged from all encumbrances subject only to the conditions and reservations in the original grant from the Crown.

"8. The original grant from the Crown contained the coal rights under the said lands and the plaintiff is not the owner of the coal rights under the said lands."

The counterclaim simply repeats paragraph 6 of the statement of defence and asks for cancellation of the agreement and repayment to the defendants of the money paid by them under it with interest. The defendants on the return of the summons brought into chambers an abstract of title to the

lands in question "reserving all mines and minerals to Sherbrooke Land Company" shewing that on its date, the 18th of June, 1914, the same stood in the plaintiff's name. After some enlargements the motion finally came before my brother Simmons on the 7th of July when a further affidavit of the plaintiff sworn on the 4th of July was filed which after setting out that the plaintiff is the registered owner of the lands in question "including the mines and minerals upon and under such lands" contains the following paragraph:—

"3. That I am and have always been since the 13th day of November, 1911, ready, able and willing to give to the defendants clear title to the said lands, including the mines and minerals, in and under the same, in compliance with the terms of the agreement of sale sued upon herein upon payment by the defendants of the sums due or accruing due under the said agreement of sale."

It was upon the statements contained in this 3rd paragraph and particularly as to the date when he acquired the title to the mines and minerals that the cross-examination of the plaintiff was sought. The learned judge's reasons for his refusal of this application do not appear before us as he disposed of the matter orally on the spot, but it was stated before us in argument and without contradiction that he refused it because as it appeared that the plaintiff then had the whole title to the lands including the mines and minerals the date upon which he acquired the title to the mines and minerals was immaterial.

The contention for the defendants is that the paragraphs of their statement of defence above set out and their counterclaim constitute a repudiation of the contract on the ground that the plaintiff then had neither the title nor the right to call for the title to a material part of the subject matter of the contract, that if the plaintiff as a matter of fact at the date of the delivery of this defence had neither the title to the mines and minerals nor the right to call for it the repudiation of the contract thereby made entitled them to be relieved of further liability under it and that their liability could not be revived by a subsequent acquiring by the plaintiff of such title or right to call for it. For this reason they say that they should have been allowed to cross-examine the plaintiff particularly as to the statement in his affidavit that he had been since the 13th of November, 1911, ready, able, and willing to make this title.

I think there can be no doubt but that if the defendants pleading amounts to a repudiation, and if the fact is that at the date of its delivery the plaintiff could not make title to the mines and minerals, this repudiation would have the result contended for by the defendants, always assuming of course, that the defendants had not by something which occurred after the discovery by them of this lack of title done something to disentitle them to so repudiate. The recent decision of this court in Goodchild v. Bethel, 30 W. L. R. 280, makes that sufficiently clear. It is contended, however, for the plaintiff that the defendants pleading which is admittedly the only thing that the defendants can rely upon for that purpose, does not amount to a repudiation. It is said that the counterclaim, which asks for a cancellation of the agreement and a return of the money paid under it, is based entirely upon the allegations of paragraph 6 of the statement of defence, and that those allegations standing alone are not sufficient to entitle the defendants to the relief prayed for by the counterclaim. I think, however, that it is to the statement of defence and not to the counterclaim we must look for the purpose of determining whether or not the pleading amounts to a repudiation. The defendants, so far as this application is concerned, are simply resisting the claim which the plaintiff makes against them for the payment of this money, and their reasons for resisting it must be found in their statement of defence rather than in their counterclaim which is practically their statement of claim in a cross-action for the return of the money already paid. I think, therefore, that we must read paragraphs 6, 7, and 8 of the statement of defence for the purpose of reaching a conclusion as to whether or not the pleading does amount to repudiation. I am of the opinion that it does, even though neither the word 'repudiate' nor any equivalent of it appears in it. The defendants by their pleading tell the court and the plaintiff the reasons why they should not be ordered to pay the amount sued for. The reason disclosed by the paragraphs in question is that the plaintiff is not the owner of the coal rights. What meaning can be drawn from this other than that because of the facts alleged the contract is not binding upon the defendants, which is as practical a way of repudiating it as can well be imagined? If, in answer to a letter from the plaintiff demanding payment, the defendants had replied that they would not pay because of the facts which they now plead in these paragraphs, I do not see how

any argument could be made that they did not thereby repudiate the contract and so I think we must treat this pleading as a repudiation.

The question then is whether or not the cross-examination of the plaintiff should have been permitted. It is urged that there was no right to cross-examine inasmuch as under old Rule 105 which was then in force the defendants could only shew cause against the application "by affidavit of himself or some one who can swear positively to the facts or by offering to bring into court the amount claimed in the action." Under Rule 103, however, the defendants were entitled to shew "by affidavit or otherwise" that they have a good defence to the action, and I do not think that this right is limited or taken away by the language of Rule 105.

The shewing of a good defence by the cross-examination of the plaintiff upon his affidavit is shewing it otherwise than by affidavit and so is strictly within the rule. The fairness of this construction could not be better exemplified than by this case. If the defendants have any defence at all to this action it is founded upon facts which are peculiarly within the knowledge of the plaintiff and which they, the defendants, are unable to prove by their own affidavits. Unless, therefore, they can get at them by this method they cannot get at them at all, and they must quietly submit to a judgment against them which the plaintiff might not be entitled to if they were able to get these facts from him under cross-examination. I am sure that no one will attribute to me the slightest intention of impeaching even by suggestion the entire accuracy of the statement sworn to by the plaintiff. I am simply endeavouring to shew the injustice that might arise from placing upon these rules a construction that would make it impossible to use a plaintiff's cross-examination in answer to such a motion.

The rule providing for such a cross-examination under the old practice is 293; "Upon any motion, petition or summons evidence may be given by affidavit; but the court or judge may on the application of either party order the attendance for cross-examination of the persons making such affidavit and may make such interim order or otherwise as appears necessary to meet the justice of the case."

It is said that the power given to the judge under this rule is discretionary. That is so, but the discretion so given must be judicially exercised and if it is not an appeal will lie. It is quite apparent that leave to cross-examine was

refused in this case because of the opinion of the learned judge that the plaintiff was entitled to succeed by reason of the admitted fact that he then was in a position to make title to all of the land and that it would avail the defendants nothing to shew that the title to the minerals or the right to call for it had first been acquired by him after their repudiation of the contract. Being in error as to this his discretion was not exercised upon a proper ground and this court not only can but should set the matter right.

Upon the argument the suggestion was made that Rule 103 does not apply to this action as the money sued for is not a debt or a liquidated demand. This point was not raised by the notice of appeal and Mr. Biggar disclaimed any idea of raising it now. He in fact expressed his willingness to submit to it as a term of allowing the appeal that this question should not be raised when the motion comes before a judge again, and I think this term should be imposed. The question is now of but academic interest in view of the fact that the new Rule 287 which takes the place of former Rule 103 applies to any action in which a defence has been filed.

I would allow the appeal with costs and set aside the order for judgment and the judgment entered under it, and direct the plaintiff to attend before the clerk for cross-examination on his affidavit of the 4th of July at a time and place to be appointed by him, after the completion of which the motion for judgment may be brought on again by the plaintiff on two clear days' notice. The defendants must not delay this cross-examination. Unless excused by the default or delay or absence or illness of the plaintiff it must be had within ten days from the delivery of this judgment, failing which the plaintiff shall be entitled to move for judgment as hereinbefore provided, the defendants upon the hearing of the motion are not to be at liberty to raise the point that this case is not within old Rule 103. Any directions with reference to such cross-examination or motion which may be necessary to meet any contingency not herein provided for may be given by a master in chambers or a judge.

STUART, BECK, and SCOTT, JJ., concurred.

Appeal allowed.

SASKATCHEWAN.

HAULTAIN, C.J. JANUARY 28TH, 1915.

REX v. WEISS.

Criminal Law—Preferring Charge—Deliberate Refusal of Attorney-General to Prefer—Any Person may Prefer Charge with Consent of Judge—When Consent Withheld —Sec. 873A. of Code.

***Held*, that, although, under sec. 873A of the Code, a judge has the power to consent to a charge being preferred by any person, the said power should not be exercised in the face of a deliberate refusal of the Crown to prefer a charge, unless the evidence taken on the preliminary enquiry discloses such a strong *prima facie* case against the accused as to suggest an abuse of his judicial discretion by the Attorney-General, or an attempt to stifle a proper prosecution.**

Application by a private prosecutor asking to be allowed to prefer a charge under the provisions of sec. 873A. of the Criminal Code.

T. J. Blain, for applicant.

No one, contra.

HAULTAIN, C.J.:—The accused, C. M. Weiss, was committed for trial at the present sittings of the court by C. A. Berry, esquire, a justice of the peace, after preliminary enquiry into a charge of theft. At the opening of the court, Mr. Sampson, agent for the Attorney-General, informed me that he was directed by the Attorney-General not to prefer a charge and to cause a stay of proceedings to be entered. Mr. Blain, on behalf of the private prosecutor, now asks me to allow him to prefer a charge under the provisions of sec. 873A. of the Criminal Code. There can be no doubt that under that section I have the power to consent to a charge being preferred "by any person." The only question for me to consider is whether I should exercise that power in the present case.

Section 962 of the Criminal Code empowers the Attorney-General to direct a stay of proceedings "at any time after an indictment has been found against any person for any offence and before judgment is given thereon." In this province we have no grand jury, so that an indictment can-

not be found against any person. Strictly speaking, therefore, this case has not reached the point at which a stay of proceedings can be entered.

Under the law as it now stands, the trial of a person charged with a criminal offence is commenced without the intervention of a grand jury, or even, it would appear, without a preliminary enquiry by a magistrate, by a formal charge in writing preferred,—

1. By the Attorney-General; or
2. By an agent of the Attorney-General; or
3. By any person with the written consent of the judge of the court; or
4. By any person with the written consent of the Attorney-General; or
5. By order of the court.

In this province the practice with regard to criminal charges is as follows: When any person is committed for trial, the justice of the peace before whom the preliminary inquiry it held transmits the original depositions to the clerk of the district court of the district in which the offence is alleged to have been committed. The local agent of the Attorney-General for the district then transmits a copy thereof to the department of the Attorney-General. Upon receipt of a copy of the depositions as aforesaid, the Attorney-General either authorizes the local agent to prefer a charge, under the provisions of sub-sec. (2) of sec. 873A of the Criminal Code, or instructs him not to prefer a charge in the matter.

In exercising this discretion, the Attorney-General is practically performing the functions of the grand jury. See In re Criminal Code, 43 S. C. R. 434, 16 Can. C. C. 549. In the present case this practice has been followed, and Mr. Sampson, the agent of the Attorney-General, has been instructed not to prefer a charge and to enter a stay of proceedings. As I have already pointed out, a stay of proceedings does not appear to be the appropriate action, as there has been no indictment found, and the case is not in court. If an indictment had been found by a grand jury, the Attorney-General would have had the right to direct a stay of proceedings, or in earlier times, to enter a nolle prosequi. "The Attorney-General alone has the power to enter a nolle prosequi, and that power is not subject to any control. His decisions when exercising such functions were not subject

to review by the Court of Queen's Bench, and are not now subject to review by the Queen's Bench Division or the Court of Appeal." R. v. Comptroller of Patents, [1899] 1 Q. B. 909, 914.

It must be admitted that there is not a complete analogy between a stay of proceedings or nolle prosequi and what has been done in this case. The practical result in this case is that the Attorney-General, on consideration of the whole matter, has instructed his agent not to lay a charge. As I have already pointed out, there is nothing in the Criminal Code to prevent me from consenting to a charge being preferred by any person. But I think that very strong reasons should be shewn to justify me in taking such a step, in face of the deliberate action of the Crown authorities. If the evidence taken on the preliminary inquiry disclosed such a strong prima facie case against the accused as to suggest an abuse of his judicial discretion by the Attorney-General, or an attempt to stifle a proper prosecution, I should have no hesitation about consenting to a charge being preferred. But (and it should be almost unnecessary to say so) I can find nothing of that sort in this case. On the contrary, after reading very carefully the large mass of evidence taken on the preliminary enquiry, I am convinced that the Attorney-General exercised a sound discretion in directing that a charge should not be laid.

I must, therefore, refuse the application.

Application refused.

THE

Western Law Reporter

VOL. XXX. TORONTO, FEB. 22, 1915. No. 9

ALBERTA.

JANUARY 14TH, 1915.

SUPREME COURT.

DANDY v. NATIONAL TRUST COMPANY, LIMITED.

Executors and Administrators—Secret Profit on Sale by Deceased—Evidence—Corroboration.

The action was brought to recover a secret profit made, as was alleged, on the sale to the plaintiff of two parcels of land by the deceased, acting ostensibly as an agent. One of the parcels had been purchased by the deceased in his own name, and the agreement for purchase had been assigned by him to the plaintiff, and a statutory declaration had been made by the deceased that he had purchased as the plaintiff's agent.

***Held*, that this was sufficient corroboration as to this parcel, but that the two transactions being distinct, corroboration as to the one parcel was of no avail as far as the other was concerned, and that there being no corroboration as to it the plaintiff could not succeed.**

Trial of action.

Alexander Stuart, K.C., for plaintiff.

H. H. Parlee, K.C., for defendants.

SIMMONS, J.:—The defendant is the administrator of the estate and effects of Joseph Robinson, late of Vermillion in the Province of Alberta.

In April, 1911, the plaintiff purchased from said Robinson the north-east quarter of section thirty-three, in township forty-nine, range six, west of the fourth meridian, in the province of Alberta, at the price of $3,200, and in June, 1911, the plaintiff purchased from said Robinson the south-east quarter of said section at the price of $2,880.

The plaintiff says that in regard to the purchase of the north-east quarter, Robinson represented to him that the land was owned by a friend of Robinson's in the United States, and that he, Robinson, could purchase it for the plaintiff cheaper than any one else could do, and, at the plaintiff's request, the said Robinson agreed to act as the agent of the plaintiff in making the said purchase.

The plaintiff says that the said Robinson then purchased the land direct from the Canadian Pacific Railway Company, the owner, at the price of $2,640, and made a fraudulent profit thereby of $560.

The plaintiff alleges that the south-east quarter was sold to the plaintiff by the said Robinson under similar misrepresentations and a secret profit of $480 was thereby obtained by the said Robinson.

The plaintiff claims from the administrator the return of said moneys so fraudulently obtained.

At the trial, the plaintiff satisfied me as to the truth of the allegations above set out. This is a case, however, where pursuant to section 12 of the Evidence Act of Alberta, ch. 3, 1910, Alberta, the statements of the plaintiff must be corroborated in some material part.

In regard to the purchase of the north-east quarter, I find sufficient corroboration to satisfy the statute.

The said Robinson purchased this quarter section from the Canadian Pacific Railway Company on the 26th of May, 1911, for $2,640, under an agreement in writing with the company of that date.

On the 5th of August, Robinson executed a quit-claim of this land to the plaintiff and on the 9th of September, 1911, he executed an assignment to the plaintiff of the contract to purchase from the railway company.

Mr. Morrison, a barrister at Vermillion, acted for both parties in the preparing and execution by the parties of the said documents. He says there was a delay in obtaining the approval of the railway company to the said assignment due to an execution registered against Robinson.

On April 1st, 1912, Robinson made a statutory declaration to the effect that in purchasing said north-east quarter, he did so as the agent of the plaintiff. In view of his statutory declaration, there is no explanation for the contract between Robinson and the railway company, and it is obvious that if his statutory declaration is true, this contract should

have been made between the plaintiff and the railway company.

Mr. Morrison says he understood from the instructions he got from Robinson that the plaintiff was purchasing direct from Robinson. Robinson has made a statutory declaration that such was not the case, but that he had no interest in the transaction beyond his usual agency commission, but he does not state the amount of the commission.

In regard to the south-east quarter, I am not able to find in the documents or in the evidence of Morrison any corroboration. They were separate transactions, each giving rise to a separate cause of action, and corroboration in regard to one transaction is not corroboration in regard to the other. Cook v. Grant, 32 U. C. C. P. 511; Re Ross, 29 Grant 385; Voyer v. Lepage, Alberta Court of Appeal, December, 1914.

The plaintiff is, therefore, to have judgment for $560 and interest at 5 per cent. from May 26th, 1911, the date of purchase of said lands, and costs.

The defendant company to have its costs paid out of the estate.

SASKATCHEWAN.

HAULTAIN, C.J. JANUARY 11TH, 1915.

CHAMBERS.

COWAN v. SCHILLING.

Dentistry—Dental Profession Act, secs. 51, 54—Unqualified Person Practising—Imprisonment in Default of Payment of Penalty and Costs—Evidence—Onus of Proof—Onus on Person Charged to Prove Qualification—Criminal Law—Conviction not Specifying Particular Acts—Power of Court to Amend.

Held, that a magistrate may order imprisonment forthwith in default of payment of a penalty and costs imposed for practising dentistry in violation of the provisions of the Dental Profession Act, notwithstanding that sec. 51 of the said Act provides a special mode of levying the same by distress.

A conviction for practising dentistry in violation of the provisions of the Dental Profession Act is bad if it does not specify the particular act or acts which constitute the alleged practising of dentistry, but where the magistrate had jurisdiction and an offence

was committed of the nature specified in the conviction this defect can be remedied by amendment.

Under sec. 54 of the Dental Profession Act, the onus is on a person charged with being an unlicensed practitioner to establish the contrary.

P. M. Anderson, for applicant.

H. F. Thomson, for informant.

C. M. Johnston, for the magistrate.

HAULTAIN, C.J.:—The most important objection to this conviction is that the evidence does not disclose an offence under the Dental Profession Act (ch. 108, R. S. Sask.), inasmuch as there is no evidence of practising for hire, gain, or hope of reward. In my opinion, there is a prima facie case. The evidence shews that the defendant practised dentistry and dental surgery and charged fees for his services. There is some evidence that a Dr. Robinson, of Winnipeg, had some connection with the business, but what that connection is does not appear. The defendant did the work, fixed the fee, and so far as the evidence goes, controlled and disbursed the moneys received by him for his services. There is some suggestion in the evidence that Dr. Robinson had something to do with the business, but what his interest is does not appear. Miss Partridge, the office clerk, seems to have had some instructions from Dr. Robinson, but she was under the control of the defendant, took her instructions and received her pay from him. The fact that the account was kept in Robinson's name does not, in my opinion, make any difference, as the defendant, according to the evidence, kept the account at the bank and drew cheques on it. The whole affair, to my mind, is an attempt on the part of Robinson to reap a little benefit by allowing an unqualified man to evade the law under cover of his name.

In any event there is no evidence that Robinson is licensed to practise in Saskatchewan, and the onus was on the defendant to establish that. (See sec. 54, "the Dental Profession Act.")

I am therefore satisfied that an offence of the nature described in the conviction has been committed. I am also satisfied that the punishment imposed is not in excess of that which might have been lawfully imposed for the offence in question.

Objection has been taken that there is no provision for distress in default of payment of the penalty and costs, as

provided by sec. 51 of the Dental Profession Act. Reading sec. 52 of the Interpretation Act (ch. 1, R. S. Sask.), and sec. 8 of the Magistrates' Act (ch. 62, R. S. Sask.), in conjunction with sec. 739 of the Criminal Code, I am of opinion that the magistrate had power to order imprisonment forthwith in default of payment of the penalty and costs, notwithstanding the fact that sec. 51 provides a special mode of levying the same by distress.

The case of Reg. v. Cantillon, 19 O. R. 197, was cited in support of the objection, but that case was decided before sec. 739 (b) of the Criminal Code was enacted. Rex v. Skinner, 9 Can. C. C. 558, and a number of cases cited therein, were all decided under sec. 744 of the Criminal Code, and do not apply to a conviction made under sec. 739 (b).

The amended conviction provides for the costs and charges of commitment and of conveying to gaol. By the Dental Profession Act, sec. 52, the fine is clearly payable to the convicting magistrate, so that there is no necessity for a direction in the conviction as to whom the fine should be paid.

The only other objection which it is necessary for me to consider is the objection that the conviction does not specify the particular act or acts which constituted the alleged practising of dentistry. On this point the cases of Reg. v. Coulson (1893), 1 Can. C. C. 114; Smith v. Moody, [1903] 1 K. B. 56; R. v. Harris (1908), 13 Can. C. C. 393, were cited, among others.

I am inclined to think that the conviction is bad on the ground stated, but as I find that the magistrate had jurisdiction, and that an offence was committed of the nature specified in the conviction, this defect can be remedied by amendment. (Per Armour, C.J., in Reg. v. Coulson, supra, at p. 117.) I will accordingly amend the conviction by inserting in the appropriate place a statement of the several acts shewn to have been committed by the defendant in the evidence.

For the foregoing reasons this application must be refused, but without costs.

Application refused.

ALBERTA.

JANUARY 26TH, 1915.

SUPREME COURT.

MAYHEW v. SCOTT FRUIT COMPANY, LIMITED.

Sale of Goods—Perishable Goods—Injury in Transit—Negligence—Carriers.

The defendants in March, 1913, bought in Edmonton from the plaintiff, a carload of potatoes to be shipped f.o.b. Grand Forks, B.C. The terms of sale were set out on a sheet of paper, having as a printed heading the name of a former company, whose business the defendants had bought out, with the name of the defendants stamped above this printed heading with the words "successors to" added. The plaintiff shipped the potatoes from Grand Forks, on the 12th of March, and when having the shipping bill made out handed the memorandum of sale to the railway clerk who, not noticing the stamped name above the printed name, filled in the latter as the name of the consignees. The plaintiff without noticing the error mailed the shipping bill to the defendants who, as was held, received it in course of post. The defendants did not obtain delivery of the potatoes till the 22nd of March, and they were then badly frozen, and they refused to pay for them. When they first dealt with the question they made no reference to the mistake in the shipping bill, but subsequently they treated this as the cause of the delay.

Held, that if the case had to be decided upon this ground the defendants would not be liable, for the fault was that of the plaintiff, who should have seen that the shipping bill was correctly made out.

But, *held*, also, that the defendants were obviously at fault, for after the receipt of the shipping bill they had ample time to correct the mistake by communication with the carriers, and to prevent any delay arising because of it.

It was contended by the defendants that the plaintiff should have made a special contract with the carriers for the care of the potatoes, but it was held that as this contention had not been pleaded it was not open to the defendants, and that apart from this without evidence the nature of the contract which might have been made with the carriers could not be determined.

Held, also, that potatoes are not "perishable goods" of such a character as those in question in *Beer* v. *Walker*, 46 L. J. Q. B. 677, so as to cast upon the seller the risk of their not arriving in good condition, and that frost in the middle of March, sufficiently severe to injure potatoes, was something sufficiently "out of the ordinary course" to bring the case within the exception mentioned in *Beer* v. *Walker*, if that case was treated as applying at all.

Appeal by the defendants from the judgment of LEES, Co.J.

A. Macleod Sinclair, for appellants.

W. E. Payne, for respondent.

STUART, J.:—This is an appeal by the defendants from a judgment of His Honour Judge Lees in an action tried at Red Deer, whereby he directed judgment for the plaintiff for $237 and interest and costs.

The defendants carried on business at Edmonton, where they had taken over by some means not clearly shewn the business of a company called The Macpherson Fruit Company, Limited. The plaintiff was a farmer residing in Grand Forks, B.C. He was in Edmonton in March, 1913, and there personally obtained an order from the defendants in the following words:—

"Edmonton, Alta., Mar. 1, 1913.

"We agree to take one car of potatoes from E. Mayhew at the price of $9 per ton, sacked f.o.b. Grand Forks, B.C., it being understood these take a rate of 42 cents per cwt. to Edmonton.

"The Scott Fruit Co., Ltd.,
"MacKelvie."

This order was written on a sheet of paper, which had a printed heading shewing that it had originally been one of the letter heads of the Macpherson Fruit Company, Limited, but above the letter, words had been stamped with a rubber stamp in red ink and in fairly large letters the words:

"The Scott Fruit Co., Limited,
"Successors to."

The plaintiff returned to Grand Forks, B.C., and there on March 12th, 1913, loaded a car of potatoes, and, having done so, went to the railway agent to secure a bill of lading. Instead of drawing it up himself, he asked the agent to do so, and, in order to give the agent the necessary information, he passed in to him through the wicket the order of March 1st above set forth. The agent overlooked the words stamped at the top of the order and made the bill of lading out to The Macpherson Fruit Company, Edmonton. He handed this bill of lading to the plaintiff, who does not seem to have noticed the error. The plaintiff then made out his account against the Scott Fruit Company for the sum of $236.70. On both the bill of lading and on the account the number of the car in which the potatoes had been placed was stated. The plaintiff mailed both the bill of lading and the account at once to the defendants at Edmonton, but did not write any letter accompanying them.

The car arrived at the switch or siding in front of the defendants' warehouse on March 22nd. The defendants examined the potatoes and they were found to be badly frozen. They refused to accept them. They sent at once the following telegram to the plaintiffs:—

"Your car, No. 184504, only arrived to-day and is badly frozen. We have refused same, as we will not look to railroad company for a claim. We have too many claims in now we can't get paid."

They also wrote a letter the same day, to the same effect practically, in which they made no mention of a wrong address. To the telegram, the plaintiff replied denying responsibility and asserting that the question was entirely one between the railway company and the defendants. On March 28th, the defendants wrote the plaintiff and then first pointed out the fact of a mistake having been made by the plaintiff in the address, adding "if the truth be known, we think you can blame that circumstance for the freezing of the potatoes." They then went on to discuss the question of making a claim against the railway company and concluded their letter by the following sentences: "There is absolutely no question about the damage having been inflicted and there is plainly some negligence on the part of the railway company. If we were you, we would not make any mention to the railway company at your point of your error in billing this car, because they may take notice of that and base an objection to the claim on it."

On April 28th, the plaintiff wrote from Red Deer threatening suit, and on April 29th, the defendants replied, urging that a claim be made against the railway company.

The plaintiff began his action in December, 1913.

The learned trial Judge, in giving judgment for the plaintiff, went upon the ground that the defendants had, by the use of the old letter-head of The Macpherson Fruit Company, when giving their order, contributed to the mistake made at Grand Forks, the point of shipment; that, when the plaintiff delivered the potatoes at Grand Forks to the carrier and handed them the order for the purpose of making out the bill of lading, he had performed his whole duty to the defendants; and that, after the delivery of the potatoes to the carrier the latter became the agent of the defendants and any mistake on the part of the carrier was the mistake of the defendants' own agent.

With much respect, I think the learned Judge, while right in the conclusion he arrived at, did not put the matter exactly upon the right ground in giving his judgment, which was an oral one.

I do not think the defendants were to blame at all in respect to the mistake made at Grand Forks. The plaintiff personally took the order from the defendants at Edmonton. He knew perfectly well that he was dealing with the Scott Fruit Company and not with the Macpherson Fruit Company. The order he took was signed by the former company. He was their agent to make a contract with the carrier and he was bound to make a proper contract. He could not relieve himself of that duty by letting the carrier make the contract on both sides. The carrier was not the agent of the defendants, in the matter of the making of the contract of carriage. It was only after the contract had been made and the goods received under it that the carrier became the agent of the buyer and the agency was then one for the carriage of the goods, not for the making of the contract of carriage. For this latter purpose, the plaintiff alone was the defendants' agent. He omitted to make a proper contract on the defendants' behalf and could not excuse himself by saying that he left it all to the other party to the contract to draw up the contract.

But, notwithstanding this, it is obvious that the defendants were ultimately at fault. It is true the plaintiff made a mistake. But he at once sent the bill of lading, in which the mistake had been made, to the defendants, who were his principals in regard to the question of the making of the contract. The bill of lading, we must assume, in the absence of any evidence to the contrary, arrived in due course of mail. What evidence there is tends to shew that it did so arrive. The position, then, is that the defendants were at once informed that a car of potatoes with a certain number had been shipped to Edmonton intended for them, but shipped in the name of the Macpherson Fruit Company. They were then aware of the mistake of their agent, the plaintiff. They had ample time to correct the mistake by communication with the carriers. They could at once have informed the carriers that car number so and so, shipped to the Macpherson Fruit Company, was intended for them. But there is no evidence that they did so. The evidence shews, indeed, that they probably assumed that the carriers would know that the goods were intended for them, because one of their witnesses admitted that they had previously received a number of cars billed to the Macpherson Fruit Company, and that the carriers had asked them, the defendants, if they

would take delivery of them. It was, therefore, quite plainly possible for the defendants to correct the mistake in ample time to prevent any delay arising on account of it. It is noteworthy that they did not in their first communication complain of any mistake and, on the whole, it appears to have been largely an afterthought on their part. Their real desire, as the correspondence shews, was to avoid the necessity for putting in a claim against the carriers.

There were two other contentions advanced in support of the appeal. One contention rested upon the terms of sec. 31, sub-sec. 2, of the Sale of Goods Ordinance, which provides that "unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case."

The difficulty in the way of the appellant on this point is that he did not allege in his statement of defence that a proper contract had not been made. I am putting aside now, of course, as already disposed of, the mistake in the address. What is suggested is that there should have been a special bargain made with the carrier as to the care of the potatoes in transit by means of a properly heated car or something of that kind. But not only is this matter not raised by the defence—and in my opinion, it ought to have been raised by the pleadings if it was intended to be relied upon—but there is nothing in the evidence to shew that there was not in fact a proper contract made. The bill of lading was put in at the trial, but it is not extended in the appeal book. No evidence was directed to the point at the trial in order to shew what a proper contract in such a case would be. Even if we had the full terms of the bill of lading before us, it would not be for the court to say what constituted a proper contract. That should have been shewn by the evidence of witnesses and there was no evidence upon the point at all. This contention, therefore, cannot be sustained.

The remaining contention was that the goods were at the seller's risk. It was admitted that in the case of ordinary goods, this would not be the case, unless there was evidence of a contrary agreement. See sec. 20 and 22, Rule V. of the Sales of Goods Ordinance, and also Benjamin on Sales, 5th ed., page 411. But it was argued that the goods in question were perishable goods and reliance was placed upon the rule laid down in Halsbury, vol. 25, section 386, which says:

"Notwithstanding that the seller may have agreed merely to dispatch the goods to the buyer by delivering them to a carrier or other agent for transmission on behalf of the buyer, nevertheless where the goods are perishable the seller is deemed to take the risk of the goods not arriving in the ordinary circumstances of transit and of their not remaining for a reasonable time after arrival in a merchantable condition."

From an examination of the case I doubt if much reliance was placed upon this point in the court below. I doubt also whether it was ever open to the defendants upon the pleadings. There was no reference in the original defence to a rejection of the goods on account of their condition on arrival, while the amendment obtained at the opening of the trial referred to damage caused by the delay arising from the mistake in the address, which is another point entirely. The argument as to the mistake in the address rested entirely on the theory that the freezing took place during the last two days of delay at Strathcona: and, if that theory be correct, although there is really no evidence to shew when the freezing occurred, then, for the reasons I have given, I think the defendants were themselves to blame for it.

But aside from that matter and assuming that upon the pleadings the point is open to the defendants, I am of opinion that the authorities cited in support of the passage above quoted from Halsbury are distinguishable. There is really only one case, Beer v. Walker, 46 L. J. Q. B. 677, which supports the proposition laid down and that case was one in regard to dead rabbit meat. As is well known, such a commodity from its very nature deteriorates rapidly. Such is not the case with potatoes. These, in the ordinary course, continue in good condition for a long while. Even the rule laid down in Beer v. Walker is subject to the condition "if nothing out of the ordinary course happened." In my opinion a frost severe enough to damage potatoes must be treated as something out of the ordinary course, the risk of which must rest upon the buyer in the absence of any indication of a contrary intention.

The likelihood of such a thing happening must have been as much present to the minds of the defendants as to that of the plaintiff and I think their only course was to have instructed the plaintiff to make a special contract on their behalf which apparently they did not do.

The rule cited from Halsbury is not found in the codified law, The Sales of Goods Ordinance, and I can see no reason for departing in this case from the ordinary rule contained in section 22.

The appeal should be dismissed with costs.

SCOTT, and BECK, JJ., concurred.

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT.

MULLER v. SCHWALBE.

Alberta Land Titles Act—Mortgage—Equitable Mortgage—Caveat Filed by Subsequent Unregistered Mortgagee—Priorities.

The owner of land subject to a mortgage deposited his certificate of title with a bank by way of equitable mortgage to secure an advance. He then transferred the equity of redemption to his brother, the transfer not being registered, and his brother, at his request, gave a mortgage to another bank, who took in good faith without notice. The mortgage could not be registered because the certificate of title was not forthcoming, but this mortgagee filed a caveat.

Held, that this caveat had the effect of giving to the second bank the same protection it would have had if its mortgage had been registered, and that it was entitled in priority to the equitable mortgagee, to the surplus proceeds of the land when sold under mortgage sale.

Stephens v. *Bannan*, 14 D. L. R. 333, and *McKillop* v. *Alexander*, 45 S. C. R. 551, specially considered.

Case stated to determine whether La Banque d'Hochelaga or the Royal Bank was entitled to the surplus proceeds of a mortgage sale.

E. B. Edwards, K.C., for La Banque d'Hochelaga.

H. R. Milner, for the Royal Bank.

STUART, J.:—Chronologically the facts, so far as revealed, seem to be as follows:

1. Schwalbe mortgaged to Muller.

2. Schwalbe transferred to Gustave Gardel, who became registered owner subject to the mortgage.

3. On 13th January, 1911, Gustave Gardel deposited the duplicate certificate of title with the Royal Bank by way of equitable mortgage as security for previous advances made to him. I say "previous advances" because I understood that to be admitted, though the case does not so state.

4. On 13th May, 1911, Gustave Gardel executed a transfer to George Gardel, which was not then registered.

5. On 17th July, 1911, George Gardel, with knowledge of Gustave Gardel and at his request, executed a mortgage to La Banque d'Hochelaga to secure advances theretofore made by the bank to Gustave Gardel.

6. On 18th July, 1911, the solicitor for La Banque d'Hochelaga tried to register the transfer to George Gardel and the mortgage, but owing to the certificate of title not being in the Land Title's Office, this could not be done and a caveat was filed in respect of the mortgage on the 19th of July, 1911.

7. Gustave Gardel on the 27th of July, 1911, executed a mortgage in the regular form to the Royal Bank to secure its advances.

8. On the 1st of August, 1911, this mortgage was registered in the Land Titles Office.

9. On the 22nd of August, 1911, the transfer to George Gardel was registered.

10. On the 9th September, 1911, the mortgage to La Banque d'Hochelaga was registered and the registrar was asked to register it as of date of the caveat, but he merely registered it as of the 9th of September subject to caveat.

11. The property was sold under the Muller mortgage by an order made in the present action and after the satisfaction of Muller's claim a balance remained in court. The above facts are stated as a special case in order to obtain the opinion of the court as to which of the two banks is entitled to the money in court.

I was at first inclined to the view that La Banque d'Hochelaga had a right to complain that the certificate of title was not in the Land Titles Office, but upon consideration I do not see how such a complaint could be well founded. That bank had no more right to complain than the person through whom it claimed, which person, though formally George Gardel, was in reality Gustave Gardel. The latter was the bank's debtor and it was practically from him that the bank obtained security. The request by Gustave to George to give

the mortgage must have been by arrangement with the bank. If then Gustave could have no right to complain that the certificate was not in the Land Titles Office, what right had the bank which claims through him, to make any such complaint unless it were shewn, which it is not, that it had altered its position in some way owing to reliance upon the certificate being where the statute says it should be? Gustave Gardel, himself, was responsible for the certificate not being forthcoming because he had previously deposited it with the Royal Bank. No doubt it was very disappointing to the solicitor of La Banque d'Hochelaga not to find the certificate of title in the Land Titles Office, but he could have discovered that fact from Gustave Gardel, from whom he was getting the mortgage, just as well. And if Gustave Gardel had said, "there is a transfer to George and a mortgage from George to you, but I have not the certificate of title, the Royal Bank has it, I pledged it to that bank," would La Banque d'Hochelaga have made a complaint against the Land Titles Office? How could it have been prejudiced except by the act of the very person from whom it was securing title? La Banque d'Hochelaga simply got all it could get from Gustave Gardel and if it wanted more it should have insisted on his securing the certificate of title from the people with whom he had deposited it. I am therefore unable to see how, when the security was merely for past advances, La Banque d'Hochelaga can claim any higher rights than Gustave Gardel himself in so far as the absence of the certificate of title from its proper place in the Land Titles Office is concerned.

This brings up again squarely the question discussed in Stephens v. Bannan, 14 D. L. R. 333. I have heard nothing in the argument in this case which induces me to alter the opinion I there ventured to express as to the effect of the filing of a caveat. The present case is of course distinguishable on the one important point that the instrument upon which the caveat is based is a registrable instrument, whereas in Stephens v. Bannan it was based upon a document which could not be registered under the Act.

There is no doubt that the registration of the caveat prevented the Royal Bank at least from thereafter acquiring any further rights either by obtaining a mortgage executed in the legal form or by registering it when obtained.

The real point is whether, the equities of the two banks being equal except as regards time, La Banque d'Hochelaga,

being second in point of time, secured a prior right by registering a caveat. It is a common ground, I think, that by the transfer from Gustave Gardel and the mortgage from the latter to La Banque d'Hochelaga, that bank secured only an equitable interest. No legal estate passed by the transfer until it was registered. Also the Royal Bank secured by the mere deposit of the certificate of title only an equitable interest and one of no higher effect than that created by the transfer and the mortgage.

It is also common ground that the equitable interest of the Royal Bank being prior in time ought to prevail unless the filing of the caveat created a new and higher right in La Banque d'Hochelaga.

In my humble opinion the words "registration by way of caveat" at the beginning of section 97 in the Land Titles Act cannot be interpreted as meaning anything more than "registration of a caveat." If, as applicable to the present case, they are to be interpreted as meaning "registration of a mortgage by means of filing a caveat based thereon," then what, one may ask, becomes of the provisions of the Act—sec. 20—which render it necessary to produce the certificate of title before a mortgage can be registered at all? If he can keep this mortgage in his pocket and merely file a caveat which will give him all the advantages of filing his mortgage not only with respect to subsequent transactions but with regard to all prior unregistered instruments or securities, then it simply amounts to this that the registration of a caveat based on a mortgage is equivalent to registration of the mortgage and the latter ceremony is entirely unnecessary. Neither certificate nor mortgage need be produced and yet a caveat based on the latter is to be given all the legal effect, even as regards prior rights, of the registration of the mortgage, although sec. 41 of the Act says that "no instrument until registered shall have the effect of passing any estate or interest, etc."

I do not overlook the provisions of sec. 97 with respect to the discretion vested in the Registrar to permit a withdrawal of a caveat and the registration in lieu thereof, of the instrument upon which the caveat is based. The Registrar in his discretion refused to permit that course in the present case. And while the concluding words of the section seem to suggest that it was in the mind of the Legislature that the substituted instrument should, when thus substituted, give

as extensive rights to the person claiming under it as if it had been registered instead of the caveat in the first instance, still that is not what it says. It merely says that it shall have the same effect with respect to priority of rights as the caveat had for which it is substituted. I do not know that I can usefully add anything to what I said in Stephen v. Bannan. I can only repeat my view that a caveat is a warning, a notice, and a prohibition, that it creates no new rights but prevents new ones arising in others thereafter, that it is intended strictly to preserve the status quo ante, to keep things exactly as they are and no more. The enactment as to priority can be applied quite effectively to a giving of a notice or a warning or a prohibition and I think that is all that is intended. This being so I think that as the Royal Bank were prior in time the equitable mortgage by deposit of title deeds ought to prevail. They can, of course, for the reason I have given, claim nothing by virtue of their registered mortgage.

As to McKillop v. Alexander, 45 S. C. R. 551, it seems to me to be of little assistance because the person whose equitable interest was prior in time was there declared to have secured, by the filing of a caveat, a superior right over legal interests acquired after that filing. He had by virtue of the maxim always had a prior right over the equitable interest acquired after his own and before the filing of his caveat.

I think judgment should go for the Royal Bank.

BECK, J.:—This is a stated case. Schwalbe gave a mortgage to Muller, dated the 7th December, 1910. On this mortgage proceedings were taken resulting in a sale. There is a surplus in court after satisfying the plaintiff's claim and the question for decision is which of the two banks is entitled to it. The dealings with the title subsequent to the mortgage were as follows:—

1910, December 14. Schwalbe transferred the land to Gustave Gardel, to whom a certificate of title was issued.

1911, January 13. Gustave Gardel deposited his duplicate certificate of title with the Royal Bank of Canada as security for past due advances.

May 13. Gustave Gardel executed a transfer to George Gardel.

July 17. George Gardel executed a mortgage to La Banque d'Hochelaga as security for past advances. This was

done with the knowledge and at the request of Gustave Gardel, and the bank had in its possession the transfer of the 13th May from Gustave Gardel to George Gardel.

July 19. La Banque d'Hochelaga, having attempted to register the transfer from Gustave Gardel to George Gardel —(which was refused owing to the duplicate certificate of title to Gustave Gardel not being in the Land Titles Office nor produced)—and the bank's mortgage, filed a caveat grounded on its mortgage of 17th July.

July 27. Gustave Gardel executed a mortgage to the Royal Bank securing the amount to secure which he had deposited with the bank his certificate of title on the 13th January.

August 1. The mortgage Gustave Gardel to the Royal Bank of Canada was registered.

August 22nd. The transfer from Gustave Gardel to George Gardel was registered and certificate of title to George Gardel issued.

September 9th. La Banque d'Hochelaga registered its mortgage requesting the Registrar to register it as of the date of the bank's caveat of the 17th July, under sec. 97 of the Land Titles Act. This the Registrar declined to do.

Section 71 of the Land Titles Act provides that "in every case where land is subject to a mortgage or encumbrance signed by the owner, the duplicate certificate of title shall be deposited with the Registrar, who shall retain the same on behalf of all persons interested in the land mentioned in such certificate.

No explanation was given why notwithstanding that the land was subject to the mortgage of the 14th December, 1910, Gustave Gardel's duplicate certificate of title had not been retained by the Registrar.

Section 97 of the Land Titles Act is as follows: "Registration by way of caveat whether by the registrar or by any caveator, shall have the same effect as to priority as the registration of any instrument under this Act and the Registrar may in his discretion allow the withdrawal of such caveat at any time and the registration in lieu thereof of the instrument under which the person on whose behalf such caveat was lodged claims his title or interest, provided such instrument is an instrument that may be registered under this Act, and if the withdrawal of such caveat and the registration of

such instrument is simultaneous the same priority shall be preserved to all rights under the instrument as the same rights were entitled to under the caveat."

Section 87 says: "So long as any caveat remains in force the Registrar shall not register an instrument purporting to affect the land mortgage or incumbrance in respect to which such caveat is lodged, unless such instrument is expressed to be subject to the claim of the caveator."

In my opinion the caveat filed by La Banque d'Hochelaga was by virtue of sec. 97 as effective as if the memorandum of mortgage which the bank held had then been registered. I would put this on the grounds stated by me in Stephens v. Bannan, 14 D. L. R. 333, where I distinguished McKillop v. Alexander, 45 S. C. R. 551; but the distinction is of no consequence in the present case for the case in the Supreme Court of Canada decides that "a caveat when properly lodged prevents the acquisition or the bettering or increasing of any interest in the land legal or equitable, adverse to or in derogation of the claim of the caveator—at all events, as it exists at the time when the caveat is lodged": (per Anglin, J., giving the opinion of the majority of the court).

At the time of the filing of the caveat, La Banque d'Hochelaga had a registrable mortgage and a transfer to its mortgagor and could and would have registered both, if the duplicate certificate of title to the mortgagor's transferor had been in the Land Titles Office, which was, owing to the land being subject to a prior mortgage, its proper place of custody. The Royal Bank's right at that time depended solely upon the deposit by way of equitable mortgage of the duplicate certificate of title in favour of Gustave Gardel bearing on its face a memorandum of the Muller mortgage and thus shewing, to one knowing the provisions of the Land Titles Act, that prima facie (see sec. 20 (2)) its proper place of custody was the Land Titles Office and that therefore Gustave Gardel had prima facie no right to its custody. The fact that La Banque d'Hochelaga registered its mortgage notwithstanding that the Registrar refused to register it as of the date of the filing of the caveat does not in my opinion prejudice the bank's position. The matter is expressly put in the discretion of the Registrar. I should fancy he would seldom if ever exercise this power, where the register shewed subsequent dealings with respect to the land, but that otherwise he would do so; in the latter case no complications

could arise for the instrument would take the place of the caveat which thenceforth would be of no importance; in the former, questions of the validity of the caveat might well be raised by persons subsequently interested. It cannot have been the intention that the substantial rights of parties should depend upon the mere discretion of the Registrar. No doubt they may depend upon the intention of the parties; but there was in this case clearly no intention on the part of La Banque d'Hochelaga in registering its mortgage to abandon any benefit derived from the caveat. No doubt too in some cases the law worked a merger even against the intention of the parties, but in equity—and therefore now in law—a merger does not take effect against the intention of the parties unless perhaps where new rights accepted on the faith of an apparent merger have intervened. See generally Pomeroy's Equity Jurisprudence, 2nd ed., secs. 786 et seq., tit. "Concerning merger," and sec. 719 and notes, tit. "Concerning priorities." I am quite satisfied, however, that there was no rule of law which would work a merger in such a case as this. At all events all the circumstances are clearly to my mind against a merger.

The caveat was notice; the mortgage to La Banque d'Hochelaga was the foundation for the bank's caveat, which was obviously filed for the purpose of securing its priority; the mortgage to the Royal Bank executed and registered after the filing of the caveat was by virtue of sec. 87 of the Land Titles Act subject to the claim of the caveator; the intention of La Banque d'Hochelaga in registering its mortgage was to retain the priority secured by the caveat, and there was nothing to lead any one to suppose otherwise.

In my opinion it is quite clear that La Banque d'Hochelaga is entitled to the money in question and there should be an order for payment out accordingly and La Banque d'Hochelaga should have its costs against the Royal Bank of Canada.

SCOTT, J.:—I agree with my brother BECK.

SIMMONS, J.:—This is a stated case which came before the Appellate Division wherein the question is raised whether the Royal Bank of Canada, who hold an equitable mortgage by way of deposit of title deeds, or a subsequent mortgagee, who registered a caveat founded upon a mortgage executed in conformity with the Act, took priority.

The lands in question were subject to a mortgage made by the former registered owner, Frederick Schwalbe, to William Muller, the plaintiff, dated December 7th, 1910, and were sold under this mortgage.

Schwalbe transferred to Gustave Gardel subject to this mortgage, and Gustave Gardel likewise transferred to George Gardel subject to this mortgage which transfer is dated May 13th, 1911.

On January 13th, 1911, Gustave Gardel deposited the duplicate certificate of title for the land with the Royal Bank of Canada by way of equitable security. On July 17th, 1911, George Gardel at the request of Gustave Gardel executed a mortgage to La Banque d'Hochelaga to secure advances heretofore made by the bank to Gustave Gardel. On the 18th of July, 1911, the solicitor for La Banque d'Hochelaga presented to the Registrar of Land Titles for registration the two transfers and the mortgage to the bank. The Registrar refused to register these instruments because the duplicate certificate of title was not in the registry office. La Banque d'Hochelaga filed a caveat under its mortgage on July 19th, 1911.

On the 27th of July, 1911, Gustave Gardel executed a mortgage to the Royal Bank to secure an indebtedness of $1,229.40, which was registered in August, 1911, as No. 6442 A. E., subject to the caveat of La Banque d'Hochelaga of July 19th, 1911.

It appears that the Royal Bank of Canada brought into the registry office the duplicate certificate of title when they registered their mortgage. La Banque d'Hochelaga then brought in their transfers from Gustave Gardel and George Gardel and registered them on the 22nd of August, 1911.

On September 9th, 1911, La Banque d'Hochelaga applied to the Registrar to have their mortgage registered as of the date of the caveat pursuant to section 97 of the Real Property Act. The Registrar registered it, however, as of the date of September 9th, 1911, and it was expressed to be subject to this caveat of July 19th, 1911.

The claim of La Banque d'Hochelaga rests upon the effect which should be given to section 97 of the Real Property Act. The section is as follows: "Registration by way of caveat by the Registrar or caveator, shall have the same effect as to priority as the registration of any instrument under this Act, and the registrar may in his discretion allow the withdrawal of such caveat at any time and the registration in lieu thereof

of the instrument under which the person on whose behalf such caveat was lodged claims his title or interest, provided such instrument is an instrument that may be registered under this Act; and if the withdrawal of such caveat and the registration of such instrument is simultaneous, the same priority shall be preserved to all rights under the instrument as the same rights were entitled to under the caveat."

A consideration of relative claims to priority outside of this section may be of some assistance in giving to this section 97 its proper effect.

The general scheme of the Real Property Act in common with other Torrens statutes is to recognize only one legal estate or interest in land, and that the person who appears by the register to be the proprietor of such estate should have full and unfettered rights of ownership and alienation: Hogg, Australian Torrens System, p. 1028. The Act does not however prevent the creation of equitable interests, but the effect of registration on behalf of a bona fide holder for value in the absence of fraud may entirely defeat what would otherwise be a claim which would be enforceable under the equitable jurisdiction of the courts.

The owner of the registered estate or interest is afforded special facilities for disposing of the property to a third party even though he may have already created a beneficial interest in a second party which said beneficial interest in so far as the claim to the property is concerned is peculiarly liable to be defeated if the registered title passes to an innocent third party.

The caveat was intended as a species of injunction to prevent the defeat of such beneficial interests and prevent any dealing with the property subsequent to the filing of the caveat which would prejudice the beneficial interest: Hogg, Australian Torrens System, p. 1028. To obtain this purpose a caveat did not require further effect than to act as a prohibition against the acquisition of any estate or interest in the land in derogation of the interest alleged as ground of the caveat, whatever that interest might be when determined by a court of equity.

In the New South Wales, Queensland, and Tasmania Torrens Acts no instrument could be entered on the register until the caveat was removed; in New Zealand no entry is to be made in the register affecting the estate or interest. In

South Australia the registrar shall not register any dealing with the land contrary to the requirements of the caveat.

In Victoria and Western Australia the provisions are similar to our Act if section 97 is omitted from our Act.

The Dominion Land Titles Act (1894) provided for the filing of a caveat by any one claiming to be interested under any will, settlement or trust deed, etc., or otherwise howsoever in any land, to the effect that no disposition shall be made of the land unless the same be subject to the claim of the caveator.

Sub-section 1 of section 99 of the Act of 1894 was repealed and a new section substituted by sec. 14 of ch. 32 of the Acts of 1898, and this section was carried into our Act as section 84 with the words "mortgage or encumbrance" added after "or otherwise in any land."

The Saskatchewan Act continued the above sections with some additions and amendations which are however of no importance to the present issue.

Section 97 of our Act had no counterpart and no parallel in the Australian Acts or in the Dominion Act or the Saskatchewan Act. It was apparently taken from the Manitoba Act where it appears as section 143.

McKillop v. Alexander, 45 S. C. R. 551, has settled the law except so far as section 97 may modify it.

The effect of a caveat under the Saskatchewan Act and under the Alberta Act, if section 97 did not appear therein, is that it prevents the acquisition or the bettering or the increasing of any interest in land, legal or equitable, adverse to or in derogation of the claim of the caveator as it existed at the filing of the caveat: per Anglin, J.

Different views have been expressed by different members of this Court as to the effect to be given to section 97.

In Brocklebank v. Burn, 15 W. L. R. 661, the Chief Justice, then Mr. Justice Harvey, held that the caveator who rergisters his claim under an agreement to purchase thereby obtains priority for his claim over any other purchaser (though prior in time) who registers his claim by way of caveat at a subsequent time.

In Stevens v. Bannan, 14 D. L. R. 333, Stuart, J., held that section 97 did not give to caveats any greater effect than McKillop v. Alexander decided should be given to them, and Mr. Justice Walsh concurred in this view.

Beck, J., held that of two innocent persons claiming under equitable titles—and all unregistered interests were equitable interests—the one who lodges a caveat first secures priority, still leaving open to the equitable jurisdiction of the court (1) whether the respective dealings with the land—were it not for the other—created an interest, and that in the same interest in the land, and (2) where the claim of either of the caveators is voided by fraud.

I concurred in the judgment of Beck, J., but in that case the court were unanimous in the result, the first caveator being in fact also first in time and no laches sufficient to disentitle him having been found against him.

In the present case the issue is pretty clear. The Royal Bank and La Banque d'Hochelaga each acquired equitable interests, the first by deposit of title deed by way of equitable mortgage, the second by acquiring an instrument, namely, a mortgage capable of being registered.

Counsel for La Banque d'Hochelaga claims, it is true, that they were entitled to rely upon section 71 of the Act which requires that the duplicate certificate of encumbered land shall be deposited with the Registrar who shall retain the same on behalf of all persons interested in the lands described therein, and that the Royal Bank in taking the pledge of the certificate did so knowing that any person dealing with the land had the right to assume that the certificate was deposited with the Registrar. There is nothing in the stated case to warrant the inference that La Banque d'Hochelaga were misled, nothing to indicate that they searched the register or made inquiries of the mortgagor and if La Banque d'Hochelaga are entitled to succeed it must be by virtue of their caveat.

I feel bound to say that if to sec. 97 is ascribed the effect of absolute priority between two innocent equitable claimants that it is a somewhat startling innovation and one which to a large extent does away with the equitable jurisdiction of the court in regard to equitable claims, and I would be glad to be able to find in the reading of the section some qualification of this view. After careful consideration I cannot read into the section any qualification. The manner of registration and the effect thereof is defined in sections 20, 23, 41, 42, 43, and 44. These sections apply only to registration of instruments and the definition of instrument in the interpretation clause 2 (K) is very wide and includes

"any other document in writing relating to or affecting the transfer or other dealing with land or evidence of title thereto." Section 46 by implication forbids the registration of any instrument which is not executed in accordance with the provisions of the Act.

In the Torrens Acts of other jurisdictions provision is made for filing or lodging caveats.

In this section first appears the term "Registration by way of caveat."

If registrations by way of caveat were confined to instruments which were in the form required by section 46 and therefore registerable instruments then effect could be given to the section which would not conflict with the general scheme of the Act, and the section would allow just what was attempted to be done in this case, namely, to register an instrument properly executed in accordance with the Act, but which through inadvertence or the absence of the duplicate certificate could not be registered. Indeed sub-section 2 of section 20 prevents the Registrar from ever receiving any such instrument as a mortgage or entering the same in the day book unless the certificate of title is produced to him, except by leave of the court or a Judge.

The words in section 97 relating to the withdrawal of the caveat and registration in lieu thereof of the instrument, "provided such instrument is an instrument which may be registered under the Act," clearly indicate that section 97 applies to instruments that may be registered under the Act and instruments that may not be so registered, and that in the case of the former the instrument may at a subsequent time be substituted for the caveat and may in the discretion of the Registrar be registered as of the date of the caveat. Were it not for this proviso, I think sec. 97 would be applicable only to such instruments as may be registered under the Act, and if this were the effect the section would not introduce any serious innovation upon the general principle of the Act.

I am not, however, able to find within the words of the section an effect restricted within narrower limits than is given to it by Harvey, J., and Beck, J., in the cases noted above, and in the result La Banque d"Hochelaga by virtue of their caveat obtained priority over the Royal Bank and are entitled to the moneys in question and the costs of the reference to the Appellate Division.

THE

Western Law Reporter

VOL. XXX. TORONTO, MARCH 1, 1915. No. 10

ALBERTA.

BECK, J. JANUARY 25TH, 1915.

DESANTELS v. McCLELLAN.

Woodman's Lien Act—Construction—What Persons Entitled to Benefit of—Contractor.

The Woodman's Lien Act is not exclusively applicable to wage-earners and labourers, but confers a lien on *any person* "cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming any logs or timber."

***Baxter* v. *Kennedy*, 35 N. B. R. 179, referred to.**

E. B. Edwards, K.C., for plaintiff.

B. Pratt, for defendant.

BECK, J.:—I have to decide whether a "contractor" may be entitled to a lien under "The Woodman's Lien Act," ch. 28 of 1913, 2nd Sess. The plaintiff agreed "to enter immediately on to timber berth 1296, block one, and log on section 34 and place in close proximity to haul to the mill or mills 2 million feet of logs to be delivered before the 1st October, 1914, and in sufficient quantity to keep the mills running."

The defendant agreed to pay "$5.00 per thousand feet for the logs."

Payment was to be made as follows: "80 per cent. of the full value . . . on the delivery of each quarter million feet."

Section 3 of the Act says:

"Any person performing any labour, service or services in connection with any logs or lumber within this province

shall have a lien thereon . . . for such labour, service or services."

Section 2, clause (c) says that the expression "person" in the 3rd section shall be interpreted to include clerks, time-keepers, storekeepers, cooks, blacksmiths, artisans and all others actually employed in connection with such labour, service or services.

This clause is obviously not a definition but merely a clause declaring that certain classes of persons concerning whom there might be doubt as to whether they come within the meaning of the word "person" are to be deemed so.

Section 2, clause (b) reads: "The expression 'labour, service or services' means and includes cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting, or booming any logs or timber and any work done by cooks, blacksmiths, artisans, or others usually employed in connection therewith whether performed by wage-earners or others.

The word "wage-earner" appears nowhere else in the Act, nor does the word "wages," nor are there elsewhere any expressions in any part of the Act which throw any light upon the question I have to determine.

One would expect the same collocation of words descriptive of persons in the latter part of clause (b) as appears in clause (c).

The words occurring in each, "others usually employed in connection—with such labour, service or services" or "therewith" I think make the classes of persons included identical; and the words "whether performed by wage-earners or others" shew that with respect to the classes of persons listed it is immaterial whether their remuneration is by way of wages or otherwise, i.e. I should say, e.g. by the piece, by way of salary, commission or profit sharing.

It seems clear then that the idea of the Act being for the benefit of wage-earners only is excluded. So also is the idea of its being for the benefit of those only coming within the ordinary meaning of the wood labourer.

Then we have to apply these interpretative clauses to the section which imposes the lien.

Then I think its meaning is accurately expressed as follows:

"Any person"—"cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming any logs or timber"—"shall have a lien thereon."

"Person" in this section shall include "clerks, timekeepers, storekeepers, cooks, blacksmiths, artisans and others usually employed in connection with such cutting, skidding, etc., whether they are to be paid by way of wages or not."

It seems to me that so read the section gives a lien to the person who contracted with the owner to cut, skid, etc., and who if he enters upon the performance of his contract does in fact in the very terms of the Act, cut, skid, etc., and that the purpose of the inclusive clause is to include a class of persons who in fact do not cut, skid, etc., but do work in connection therewith without whose services, the work could not be carried on.

There seems to be only one Canadian authority which is of any assistance—Baxter v. Kennedy, 35 N. B. R. 179. That case held, one judge dissenting, that the New Brunswick Act was limited to wage-earners, but the Act is very different and much stress was laid upon the use in it of such words as wages.

It is admitted that a considerable sum is owing to the plaintiff under his contract. I shall therefore hold that the plaintiff is entitled to a lien under the Act.

There are some subsidiary questions as to the amount owing to him and the remedies to be given him pending the final determination of the action. These and any other questions can be spoken to.

BRITISH COLUMBIA.

FEBRUARY 9TH, 1915.

COURT OF APPEAL.

REX v. MAY.

Evidence—Adverse Witness—Discrediting One's Own Witness—Canada Evidence Act, sec. 9—Previous Statement Inconsistent with Present Testimony—Previous Statement Inadmissible—Duty of Judge to Tell Jury to Disregard—Sec. 1019 of Code—New Trial.

By sec. 9 of the Canada Evidence Act, it is a condition precedent to the admission in evidence of a previous contradictory statement by a witness that he should, in the opinion of the court, have proved adverse.

Where evidence has been improperly admitted and the trial judge has failed to tell the jury to totally disregard the said evidence, the Court of Appeal may order a new trial under sec. 1019 of the Criminal Code, if it is of the opinion that the jury were influenced by the said evidence.

A case stated by CLEMENT, J., for the opinion of the Court of Appeal.

The Court consisted of MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

D. S. Tait, for prisoner, appellant.

Maclean, K.C., for Crown, respondent.

MACDONALD, C.J.A.:—The questions submitted are as follows:

(1) Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or any part thereof;

(2) Does my charge to the jury contain any comment on the failure of the accused to testify on his own behalf upon his trial?

The second question should be answered in the negative.

Turning to the record of the proceedings to which the learned judge has referred us, and upon which the answer to the first question must depend, it will be found that the

learned judge was applied to by Crown counsel for permission to examine the witness Joseph May as an adverse witness under sec. 9 of the Canada Evidence Act, though called on behalf of the Crown. The learned judge thought that although there was nothing to lead him to say that the witness had proved adverse, yet in order to decide that question he might receive the evidence of a previous statement alleged to be at variance with an answer the witness had just given in the box.

The propriety of that course appears to me to depend upon the strict legal construction to be placed on the section in question which is in derogation of the common law. As I read the section, it is made a condition precedent to the admission in evidence of a previous contradictory statement by the witness that he should, in the opinion of the court, have proved adverse. Coleridge, C.J., in Rice v. Howard (1886), 16 Q. B. D. 681, refused to look at an affidavit which was alleged to contain a statement by the witness in that case at variance with his then testimony for the purpose of deciding the question of the witness's hostility. On appeal to the Queen's Bench Division the judgment below was sustained on other grounds, and while the court declined to express a final opinion upon the question now before us for decision, Grove, J., with whom Stevens, J., concurred, nevertheless said:

"With regard to the first point, as to the rejection of evidence in not looking at the affidavit in order to ascertain if the witness were hostile, the great difficulty seems to be that in order to satisfy the judge of the witness's hostility counsel would have to put in the very evidence which he wanted to prove his right to use. Upon this point I entertain considerable doubt. It has not been decided whether, when a witness does not appear to be hostile, the judge can look into other matters to shew that he is hostile."

Several other cases were referred to during the argument, but in none of them was the precise point now under consideration decided.

It cannot I think be doubted that the question of the witness's hostility is one to be decided in the presiding judge's discretion. If he has exercised that discretion we cannot, sitting as a Court of Criminal Appeal, review his finding. Here the learned judge has made it plain that he

did not, and as he thought could not, from anything which was at the time before him, decide whether the witness had proved adverse or not. In other words, he made it plain that he had not exercised the discretion vested in him, but determined to admit the alleged contradictory statement before coming to an opinion as to whether the witness had proved adverse or not.

If my view be correct, he admitted a writing which but for the statute, would be inadmissible, and which under the statute would only be admissible when he had come to the conclusion that the witness had proved adverse.

I think therefore that the first question must be answered in the affirmative.

I then come to consider the application to the circumstances of this case of section 1019 of the Code. It was contended by counsel for the Crown that even if the writing were improperly admitted, yet the learned judge by the following instruction sufficiently warned the jury against paying attention thereto:

"I think you should treat the evidence of that cripple (Joseph May) as only proving this fact: that is that the trousers were the property of the accused. With regard to the identification of the shirt, I think Mr. Peters is right in saying that his evidence does not tend to prove that the shirt is the shirt of the accused. It simply proves that in the box before you where he was subject to cross-examination he was not prepared to identify the shirt. It was given in evidence properly I think under the Code that upon another occasion he had said that he did recognize the shirt as being his brother's, but I do not think that should lead you to decide the case upon any finding upon his testimony that the shirt was the shirt of the accused. There is of course other evidence and the weight of that is for you to decide which goes to substantiate that fact that the shirt which was found there on the trail was in fact the shirt of the accused."

There is nothing in this to warn the jury that the improperly admitted evidence must be discarded by them. Naturally the learned judge did not intend so to instruct them because he told them that the writing was properly admitted. His warning was as to the weight to be attached to the evidence of Joseph May. His instruction did not in my opinion go far enough. The jury should have been told

that the writing was not properly before them at all, and was not legal evidence of the facts it purported to relate; that they must discard it altogether—not that "I do not think that (the writing) should lead you to decide the case upon his testimony that the shirt was the shirt of the accused."

In the absence of such sufficient warning it must appear highly improbable that the jury was influenced by the writing: Ibrahim v. Regem, [1914] A. C. 616.

I think it highly probable that the jury were greatly influenced by the writing in question, and that hence the conviction should be set aside and a new trial ordered.

IRVING, J.A. (dissenting):—The question how far a party is at liberty to discredit his own witness—and in what way—has been a subject of dispute for many years. Sec. 9 of ch. 145 represents sec. 3 of the Imperial Criminal Procedure Act, 1865, (28-29 Vict. ch. 18, which re-enacted sec. 22 of the C. L. P. Act, 1854, 17-8 Vict. ch. 125.)

The section and the following one are not happily arranged.

Section 3 suggests a doubt that you cannot contradict a witness called by you—even if hostile—unless you get a ruling from the judge that he is hostile. That is not the law, and was not the law in 1859 when Greenough v. Eccles (1859), 5 C. B. N. S. 784 was decided. Williams, J., says at p. 802, that you might contradict him by other evidence relevant to the issue—although you could not discredit him by general evidence of bad character, and he adds: "This right to contradict your witness by other evidence relevant to the issue is not only established by authority, but founded on the plainest good sense."

When the leave to cross-examine has been obtained the 10th section applies.

Now what took place was this: The police before the trial had obtained from the brother of the prisoner a written statement, and he had also been examined in the police court, and when this brother went into the box he was at the outset, asked if he previously had not made a different statement to that which he was now making with reference to the way in which he (the prisoner) had spent the afternoon. Mr. Peters took the objection that the witness could not be

cross-examined until he had shewn his hostility in open court and the judge's leave obtained; and that until such leave had been obtained it was impossible for the previous statement or depositions to be put in.

The learned judge thought that one way to prove the witness's hostility was to look at the depositions, and he did so, and came to the conclusion the difference between the two statements as to that particular point was immaterial.

The examination proceeded and the witness was shewn various articles of clothing which he identied. These it is not disputed were the prisoner's. He was then shewn a shirt, and was asked if that was his brother's, to which question he replied at first "no," and then said "I don't know."

The following then occurred:—

"Q. Now ask him if he remembers telling the police at the police office at Hazelton that that was John May's shirt.

Mr. Peters: Now, my Lord——

The Court: That question so far is all right.

Mr. Peters: Now, he puts the question, does he remember telling that it was so and so.

The Court: Well, perhaps the proper form of the question would be 'did you ever at any time make a different statement?'"

(Argument).

"The Court: Well, if it is necessary, I will consider a special case, but I am quite clear. How am I to be guided in considering whether the man is hostile or no? He may keep a most placid demeanour in the box.

Mr. Peters: This man must be acquitted or convicted upon the evidence given in this court, and not by statements made out of court.

The Court: No, that is quite true.

Mr. Peters: By getting this evidence in, you are trying this man, not on the evidence given in this court, but by statements outside.

The Court: No, surely I can tell the jury that that is not evidence, but I have to be satisfied as to the man's hostility. How am I to be satisfied?

Mr. Peters: By his demeanour.

The Court: No, I don't think so. At all events, I am going to allow this question, so far. Ask him if he made at any time, a different statement."

The Crown counsel then put the question, giving time and place, and later on the Crown used the paper in contradicting him and also called two other witnesses to contradict him.

I break off here to repeat what I have already said on the authority of Williams, J., that it was open to contradict him by these other two witnesses without leave of the judge. In his address to the jury counsel for the Crown read to them the statement made by the witness to the police.

In the course of his summing up the learned judge said:

"Before speaking of the evidence as presented at the place of the crime, there are two or three matters that perhaps I had better dispose of. Very strong objection has been made to the reception of the testimony of the brother of the accused. It is a harrowing thing in any criminal trial, particularly in a murder tral, where one brother is called upon to give evidence against another. And in this case, I think you should treat the evidence of that cripple as only proving this fact: that is, that the trousers were the property of the accused." (Let it be noted that the trousers were not referred to in the written statement.) "With regard to his identification of the shirt, I think Mr. Peters is right in saying that his evidence does not tend to prove that the shirt is that shirt of the accused. It simply proves that in the box before you, where he was subject to cross-examination, he was not prepared to identify the shirt. It was given in evidence, properly, I think, under the Code, that upon another occasion he had stated that he did recognize the shirt as being his brother's, but I don't think that should lead you to decide the case upon any finding upon his testimony that the shirt was the shirt of the accused. There is, of course, other evidence, and the weight of that is for you to decide, which goes to substantiate that fact, that the shirt that was found there on the trail, was, in fact, the shirt of the accused."

The prisoner was found guilty, and the learned judge reserved for the opinion of this court the question: Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or any part thereof?

The question includes (1) the allowance of the cross-examination of the witness; (2) the contradiction of the prisoner's sworn testimony (a) by the production of the

statement, and (b) by the proof of the two witnesses; (3) the right of the counsel for the Crown to read it in his address: and (4) the direction of the judge with reference to the evidence.

In my opinion the cases establish that the proper way to determine the question of the prisoner's hostility is by his conduct in the box, and that Mr. Peter's objection was well taken that the learned judge was putting the cart before the horse; but nevertheless eminent judges have adopted the same method that the learned judge adopted in this case. e.g. Mr. Baron Bramwell in Amstell v. Alexander (1867). 11 L. T. N. S. 830, where that learned judge thought that although the witness had displayed no animus, he was nevertheless adverse and allowed the witness to be contradicted after being informed of the different statemnt. That was a nisi prius decision and the case does not seem to have gone further. Again, in the case of William Smith (1909) tried by Lord Coleridge, where a boy—the prisoner's son—gave evidence on the trial at variance with a previous statement made by him to the police—the learned judge having become cognizant of the statement—allowed the counsel for the prosecution to treat the boy as hostile and to refer in his address to the jury to the fact of the statement and the witness's variance from it. The case is reported in 2 Crim. Appeal Reports, at 86 and 106.

The appeal in this last case—heard before the Lord Chief Justice, Lord Alverstone, Mr. Justice Darling and Mr. Justice Jelf—was dismissed. The judgment saying "the fact that the boy was allowed to be treated as a hostile witness made no difference to the case." Apparently the contradictory proof by the constables in that case, having regard to the charge, was sufficient to uphold the prosecution.

Now let us again turn to the direction to the jury. The judge referred to the fact that the witness on "another occasion" had identified the shirt, but said that he did not think that should lead the jury to decide the case upon any finding upon the boy's testimony that the shirt was the shirt of the accused, he then goes on to invite the attention of the jury to the other evidence (properly admissible as I have pointed out) the weight of which he said it was for the jury to decide.

The learned judge having drawn the distinction between what was said "on another occasion" and in the witness's

"testimony," and having expressly told the jury that "his evidence did not tend to prove that the shirt was the shirt of the accused," the case is governed by section 1019; see Ibrahim v. R., [1914] A. C. at p. 616, 83 L. J. P. C. at 193, explaining the Makin Case, and pointing to the correcting effect of the judge's charge. The first question I would answer adversely to the prisoner.

With reference to the reading of the witness's statement to the jury, and the argument based on the fact that the statement referred to matters other than the shirt, it would have been better, I agree, if the learned judge had told the jury that the statement was not to be regarded as evidence at all, but nevertheless I think the matter was cured by what the judge said.

As to the second question, I refer to R. v. Burdell, 11 O. L. R. 440 and R. v. Guerin (1909), 18 O. L. R. 425, and I would answer that question adversely to the prisoner.

MARTIN, J.A.:—Dealing first with the second question reserved I need only say that I agree with my brother McPhillips that it should be answered in the negative: it is covered in principle by R. v. Aho (1904), 11 B. C. 114.

The first question should be answered in the affirmative. It raises clearly, I think, a "question of law" under section 1014, viz.: as to whether or no the learned judge was entitled to take the course he did to decide the question of the witness "proving adverse" under section 9 of the Canada Evidence Act. I pause here to say that I feel there is much to be said in favour of the contention that was pressed upon us that as a matter of fact the learned judge did not find that the witness had "proved adverse," but had allowed the question to drift along without giving a definite ruling upon it. If I were forced to come to a decision upon his action it would be in favour of the accused, because though others might take the view that though no definite ruling was given yet an advance one may be gathered from the whole proceedings on the point nevertheless, to my mind, and with all due respect, we ought not to be placed in such an unsatisfactory position when a man's life is at stake and I should feel it my duty to give the accused the benefit of an ambiguous situation; no room for uncertainty should have been left in so important a matter.

But assuming that the fact was found, then the evidence the learned judge resorted to in order to "prove" that fact

was objected to, and if it were not permissible for him to consider it, then there was no ground at all for finding the witness to be "adverse" to the party who called him, and, as a consequence, allowing him to be cross-examined and, in effect, contradicted out of his own mouth by that party, since the learned judge stated that he did not so find because of the witness's demeanour, and there was no other evidence. If the learned judge had reached his conclusion upon demeanour as well as upon evidence he even wrongly admitted, then there would have been no appeal from his decision as there would have been some evidence, at least, to ground it on: R. v. Mulvihill (1914), 19 B. C. 197, 209; Rice v. Howard (1896), 16 Q. B. D. 681, 55 L. J. Q. B. 311, 34 W. R. 532; Price v. Manning (1889), 42 C. D. 372. While I quite agree with what was said in Rice v. Howard about the necessity of the trial judge being free to exercise his discretion in determining these "preliminary or interlocutory questions arising during a trial" and that he should not be hampered in the exercise of that discretion by requiring strict proof of the material upon which he does exercise it, yet that language does not apply, as will be seen later, to a case like the present where the complaint is that there was no material at all before him upon which he could or did act. It is not a question of strict proof, but of no proof. While all the decisions since the statute was first passed in 1854 (those before are not of real assistance) are not uniform upon the meaning to be given the word "adverse," it having in some cases been apparently treated as meaning "unfavourable" or "opposed in interest," yet the weight of authority is overwhelmingly in favour of its being construed as "showing a hostile mind" which was the view taken in the leading decision on the point by the Court of Common Pleas, in banc, in Greenough v. Eccles (1859), 5 C. B. N. S. 784, and not only has no court of higher authority questioned that view but it has been independently adopted (without citing it) by the Court of Appeal in Price v. Manning, supra, over-ruling Clarke v. Saffery (1824), Ry. & Mood. 126, wherein all the Lords Justices agreed that the witness must be shewn to be "hostile" before he can be cross-examined by the party calling him, and Lord Justice Lopes says in his judgment that the Master of the Rolls (Lord Esher) and Lords Justices Lindley and Bowen also took the same view, so the decision is one of great

authority as the court included all the members of the Court of Appeal.

There is a direct authority against the contention that is put forward by the Crown here, and it is to be found in the ruling given by Lord Chief Justice Coleridge in Rice v. Howard, supra, at p. 682, in the Q. B. D. report, where counsel for a defendant having called a witness, Howard, found he was giving evidence in conflict with that which he had previously given in an affidavit and for that reason "asked leave to treat Howard as a hostile witness and in order to shew he was hostile asked Lord Coleridge, C.J., to look at" said affidavit, but the learned judge "being of opinion that there had been nothing in the witness's demeanour, or in the way he had given his evidence to shew that he was hostile refused to look at the affidavit." A new trial was moved for in the Queen's Bench Division on the ground that the affidavit should have been looked at but the court refused it, holding that it had no power to review the discretion of the Chief Justice. It will be observed that this result is precisely in accordance with what I have written above, in that the matter had been decided by the trial judge upon evidence before him, viz., the demeanour and the way in which the witness had given his evidence, and therefore there was no appeal; and in like manner there would have been none in this case if the learned judge below had based his decision on that ground. It is further to be noted that in the course of the argument of Rice v. Howard, Mr. McCall, as amicus curiae, drew the attention of the court to a prior decision of Mr. Justice Field in 1878 in Vestry of St. Leonards Shoreditch v. Stimson, where he adopted the same course as Lord Coleridge did and "refused to look at a letter tendered for the same purpose as the affidavit here." And in the report given in the Weekly Reporter, supra, p. 533, Grove, J., said, with the concurrence of Stephen, J.:—

"And Mr. McCall referred us to a case which is almost identically this case, except that there it was a letter instead of an affidavit on which it was proposed to cross-examine a witness. There the judge refused to look at the letter; and the court held that it was a matter entirely within his discretion. Thus we have one express decision and one strong dictum. And that is quite sufficient to bind us."

The proposition now put forward that the witness can be contradicted, as was done at the trial, either by his own inconsistency or other statements before he is found to be adverse, i.e. "hostile" is in my opinion not only contrary to the best authority, but to the letter and spirit of the statute which says that "if the witness, in the opinion of the court proves adverse, such party may contradict him by other evidence or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony . . ." There is a condition of hostility which must first be established before the party is entitled to the consequences of such proof, i.e. the right to contradict or discredit his own witness; this result is stated in the statute to be conditional upon the proof, but what has been done here is to invoke the consequences to prove the condition, which would be something akin to hanging an accused to prove a murder: in other words, an inversion of the intention of the statute. The matter is clearly put by Williams, J., in Greenough v. Eccles, p. 805, in what he says is the "reasonable and indeed necessary" construction of the statute:

"The section requires the judge to form an opinion that the witness is adverse before the right to contradict or prove that he has made inconsistent statements is to be allowed to operate."

Willes, J., agreed "entirely" with Williams, J., and Cockburn, C.J., did not assent.

I am therefore of the opinion, following these three direct decisions upon the point, that it was not open to the learned trial judge in the case at bar to have permitted the witness to be contradicted in advance by his own statement either to enable the judge to form an opinion upon his hostile mind or for counsel to discredit him: in the circumstances the failure to prove the witness to be adverse prevented his statement being admitted as evidence for any purpose.

In coming to this conclusion I do not wish it to be understood that in my opinion the trial judge is necessarily restricted to the demeanour of the witness or the way he gives evidence in determining this preliminary question of hostility. He may be assisted to that end by questioning the witness, or allowing him to be questioned by counsel. It might be, e.g., that in answer to the judge the witness might make

such admissions of previous antagonistic or revengeful utterances against an opposite party as would establish the existence of a hostile mind; and said utterances might be proved against him if not admitted.

It follows from the foregoing that in my opinion there must be a new trial because the statement was "improperly admitted "as evidence for any purpose against the accused and it is clear to me that by such admission "some substantial wrong or miscarriage was thereby occasioned on the trial" within the meaning of section 1019 of the Criminal Code. It not only "may have influenced the verdict of the jury and caused the accused substantial wrong," as the majority of the Supreme Court of Canada held to be sufficient to grant a new trial in R. v. Allen (1911), 44 S. C. R. 331, at 341, 363, but it must inevitably have done so in the circumstances before us. Cf. R. v. Davis (1914), 19 B. C. 50 at 64. It may be that the result would have been different if the learned judge, after allowing the statement complained of to be "given in evidence," as he states at p. 131 of the case, and read to the jury, had warned the jury to disregard it, not only as pertaining to the red shirt but otherwise, but instead of so doing he treated it as being an element in the weight of evidence before them for certain purposes at least, whereas it was not admissible at all. In the case of a confession wrongly admitted, it was held by this Court in R. v. Sonyer (1898), 2 C. C. C. 501, that even a warning is not sufficient but that the jury should be discharged and a new one empanelled: though according to the late decision of the Privy Council in Ibrahim v. Regem (1914), 83 L. J. P. C. 185, which my brother Galliher has kindly called my attention to, it would appear that this course need not always be taken, their Lordships (after pointing out the difference between their duty and that of "a statutory court of criminal review,") saying, p. 194, "the rule can hardly be considered to be settled . . . " and the result has varied in different circumstances. In considering the cases on the point the statutes on which they were decided must be closely scanned because an apparently slight change from the language employed in our section 1019 may have grave results.

GALLIHER, J.A.:—The case reserved for the opinion of this court is:—

(1) Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or in any part thereof;

(2) Does my charge to the jury contain any comment on the failure of the accused to testify on his own behalf upon his trial?

When the whole of the judge's charge is read as it relates to the second point I am quite clear that this question should be answered in the negative.

The error in law complained of in the first question reserved is that in the examination in chief of Joseph May, a brother of the accused called on behalf of the Crown, the learned trial judge permitted Crown counsel to cross-examine him with regard to a previous statement made by him which was in writing, and which statement was read to the jury, and also in permitting other witnesses to be called to prove such statement.

Section 9 of the Canada Evidence Act governs in this case.

That section is as follows:

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement."

In the present case we are concerned only with the second alternative in that section—"or by leave of the court may prove that the witness made at other times a statement inconsistent with his present testimony."

Is it a condition precedent that before the court permits this course to be taken the witness shall in the opinion of the court prove adverse.

I think it is, although I confess it is not clear to me why the words "by leave of the court" are placed in this clause.

The principle test as to whether a witness is adverse or not is that of demeanour in the box, but there may be cases such as here where the witness speaks through an interpreter,

and it is impossible to detect from his demeanour whether he is adverse or not.

This seems to have been the predicament the learned trial judge found himself in and he permitted the written statement of the witness to be put in, the witness to be examined thereon, and evidence adduced to prove the statement before finding (and in fact he made no specific finding) that the witness was adverse.

A perusal of the English cases shews a considerable divergence of opinion as to the method to be pursued in such a case, but I find none of them which goes so far as uphold the course pursued here.

I do not go so far as to say that the judge at the trial may not satisfy himself in some way without having the whole statement go before the jury that the witness is adverse because he has made a contradictory statement at another time, in fact I am of opinion that a witness may be found adverse by reason of his making such contradictory statement, although his demeanour in the box does not disclose the fact. However, be that as it may, the course pursued here in my opinion amounts to a wrongful admission of evidence.

This brings us to a consideration of section 1019 of the Code.

Did the admission of the evidence and the reading of the whole statement to the jury occasion a substantial wrong or miscarriage of justice?

In the recent case of Ibrahim v. Regem (1914), 83 L. J. K. B. 185, Lord Sumner, delivering the judgment of their Lordships of the Privy Council, says at p. 194:

"In England, where the trial judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal under the similar words of the Criminal Appeal Act, 1907, s. 4, may refuse to interfere, if it thinks that the jury, giving heed to that warning would have returned the same verdict . . . Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction, if it thinks that the jury may have been influenced by it, even though without it there was evidence sufficient to warrant a conviction—Rex v. Fisher (1909), 79 L. J. K. B. 187, [1910] 1 K. B. 149."

A nice distinction seems to be drawn here in cases where the trial judge has warned the jury not to act upon the objectionable evidence, and where the jury are not so warned.

We have, therefore, to consider under which of these two classes the case at bar falls.

The learned trial judge instructed the jury that they were to treat the evidence of the cripple (meaning Joseph May), as only proving that the trousers were the trousers of the accused, and with regard to the shirt that what was given in evidence of a previous statement that he recognized the shirt as the shirt of the accused, should not lead them to decide the case upon any findings on Joseph's May's testimony.

The learned trial judge by this probably intended that the jury should have excluded from their minds as evidence the whole of the written statement put in in Joseph May's testimony, but I think he fell short in that respect by not specifically charging the jury to entirely disregard the written statement as proof of any material fact in the issue.

I feel all the stronger in this regard by reason of the fact that the written statement which counsel for the Crown read to the jury in addressing them contains a statement that the accused when he came home on the night of the murder had on no shirt, no hat, just underclothes, pants and boots.

That condition would fit in with the fact that what was said to be the coat, hat and shirt of the accused were found at the scene of the murder.

Joseph May was questioned as to whether he had not described to the police how the accused was dressed when he returned that night and denied that he had.

As to this condition, there was, as I view it, no sufficient warning to the jury to disregard it, and as it was something very likely to impress itself on the minds of the jury and to influence them, I would answer the question in the affirmative and grant a new trial.

McPHILLIPS, J.A.:—The case reserved calls for answers to the following questions:

(1) Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or any part thereof:

(2) Does the charge to the jury contain any comment on the failure of the accused to testify in his own behalf upon his trial?

Answering the second question first, my opinion is that the learned trial judge did not comment on the failure of the accused to testify. Therefore, my answer to question two is in the negative: Rex v. Aho (1904), 11 B. C. R. 114.

In my opinion, however, question number one must be answered in the affirmative.

Firstly, in my opinion the learned trial judge did not hold that the witness Joseph May was a hostile witness, to admit of the production of extraneous evidence to contradict him. But if I should be in error in this, the admission of the written statement to establish hostility was error in law, on the part of the learned trial judge. There should have been other evidence upon which the learned trial judge could have proceeded in arriving at the conclusion that the witness was adverse, and no such evidence being present in my opinion there was no exercise of a proper judicial discretion and something was done not in accordance with the law. Rice v. Howard (1886), 55 L. J. Q. B. 311; Price v. Manning (1889), 58 L. J. Ch. (C. A.) 649; Wright v. Wilcox (1850), 19 L. J. C. P. 333; Rex v. Crippen (1911), 80 L. J. K. B. 290, at p. 293.

Secondly, the written statement of the witness Joseph May was improperly admitted in evidence; it was inadmissible evidence as against the accused and was used against him. This is clear and cannot, in my opinion, be gainsaid. Dibble v. The King (1908), 1 Cr. App. R. 155, is high authority that the contents of a previous statement to contradict and to discredit a witness are not evidence against the prisoner, and in that case there was present that which is absent here—the caution to the jury against putting any reliance on the statement as it was not evidence against the accused—and notwithstanding this caution Lord Alverstone, C.J., in giving the judgment of the Court of Criminal Appeal at p. 157, said:—

"The statements of Williams and White were evidence against the latter but not against Dibble and it is difficult to doubt that the jury were prejudiced against Dibble by that evidence. Even the fair summing up and grave caution of the Recorder to the jury could not prevent that from happen-

ing. . . . The unfortunate admission of Williams and White's statements unavoidable as it was may have prejudiced the jury: it was impossible to believe that they had no effect on their minds; it was impossible to discover whether in their absence the jury would have considered Dibble's guilt to be proved."

In the reserved case it is stated that counsel for the Crown read the statement to the jury, and the learned trial judge referred to the statement in his charge to the jury in the following terms:—

"It" (referring to the statement) "was given in evidence properly I think under the Code, that upon another occasion he" (referring to the witness Joseph May) "had stated that he did recognize the shirt as being his brother's, but I don't think that should lead you to decide the case upon any finding upon his testimony, that the shirt was the shirt of the accused. There is, of course, other evidence and the weight of that is for you to decide, which goes to substantiate that fact that the shirt that was found there on the trail was in fact the shirt of the accused."

Upon the argument the learned counsel for the Crown frankly stated that the statement was a "crucial statement" but contended that it was not admitted in evidence but only used to discredit Joseph May's story in the box and to contradict him. With all deference to the able argument advanced to establish this contention and that no error in law occurred at the trial I am impelled to say and to hold that the statement was admitted and improperly admitted in evidence.

In the consideration of all criminal appeals undoubtedly sec. 1019 of the Criminal Code is to be borne in mind. In the present case exactly that which is provided against occurred, i.e., a substantial wrong was done the accused on the trial.

In the result the inadmissible evidence may have influenced, and prejudiced the jury bringing about a miscarriage of justice which is to be relieved against. It therefore follows that in my opinion the appeal must be allowed, the conviction quashed and a new trial directed for the foregoing reasons. Allen v. The King (1911), 44 S. C. R. 331 at p. 341.

Conviction quashed and new trial ordered; IRVING, J.A., *dissenting.*

MANITOBA.

GALT, J. JANUARY 28TH, 1915.

TRIAL.

TURNER v. McGAVIN.

Company—Sale of Shares in Company—Defect in Title to Land of Company — Liability of Vendor for Expense Incurred in Obtaining Title.

The plaintiff sold to the defendants as a going concern the business carried on by two companies and by the plaintiff, and the shares of the capital stock of these companies were transferred to the defendants. Subsequently upon a resale of part of the assets by the defendants it was found that there was outstanding an interest in some of the land of one of the companies, and in order to obtain title the defendants transferred to the owner of this interest a number of shares in one of the purchased companies. In this action by the original vendor for a balance of purchase money the defendants counterclaimed for the value of these shares:—

But, *held*, that they could not succeed, the plaintiff having fulfilled all the obligations cast upon him and being in no way answerable for the difficulty in completing title.

W. H. Curle, and S. L. Goldstein, for plaintiff.

E. Anderson, K.C., for defendants.

GALT, J.:—The statement of claim in this action relates merely to a promissory note for $8.750 made by the defendants in favour of the plaintiff on January 8th, 1912. At the opening of the trial counsel admitted defendants' liability upon this note, so nothing further need be said about it.

The real contention arises out of the defendants' counterclaim whereby they claim payment of the sum of $12,740 with interest thereon from the 23rd of November, 1912. The basis of this counterclaim consists of the alleged value of certain preference shares which the defendants say they were obliged to give to one Keilbach in order to procure title to a portion of the lands embraced in a certain agreement made between the plaintiff and two of the defendants on September 14th, 1910.

On that date an option was given by the plaintiff to sell to Douglas C. Cameron and John C. McGavin, both of the city of Winnipeg, or their assigns, as a going concern, the business carried on by the Manitoba Glass Manufacturing

Company, Limited; and the Manitoba Pressed Brick Company, Limited, and by Turner himself, and being more particularly described as follows:—

"1. The north-east quarter of section thirty-five (35) in township twelve (12) and range seven (7), east of the Principal Meridian in the province of Manitoba, excepting that portion taken for the right-of-way of the Canadian Pacific Railway Company, and also that portion of the said lands lying north of the said Canadian Pacific Railway Company's right-of-way, and also a small block of about two hundred and seventy (270) feet by one hundred and seventy (170) feet on which is situated the house of one Joseph Keilbach. leaving in all one hundred and forty (140) acres more or less.

"2. All shares, stocks, (issued or unissued), securities, franchises, rights, accounts, buildings, plants, ways, machinery, railway spurs, sidings, tools, goods, chattels, effects and assets of the Manitoba Glass Manufacturing Company, Limited.

"3. All shares, stocks, (issued or unissued), securities, franchises, rights, accounts, buildings, tools, plants, ways, machinery, railway spurs, sidings, goods, chattels, effects and assets of the Manitoba Pressed Brick Company, Limited.

"4. And also the goodwill, trade rights, trade marks, brands, patents, inventions, formulæ, recipes, trade names, patterns and stock-in-hand owned or controlled by the said companies and myself.

"All of the said property, goods, chattels and effects to be at the time of such sale free and clear of all liens, charges, incumbrances, taxes and assessments.

"The consideration for the said sale is to be two hundred and fifteen thousand dollars payable as follows: &c., &c."

The said option was accepted upon the same day and signed by the purchasers. It appears that at the time the plaintiff was the owner of the lands mentioned in paragraph 1 of the option and that he also controlled the shares of both the Manitoba Glass Manufacturing Company, Limited, and the Manitoba Pressed Brick Company, Limited.

The buildings and plant of the Manitoba Glass Manufacturing Company, Limited, were situated, not on the lands mentioned in paragraph 1, but on the south-east quarter of section 35. The lands occupied by the glass company and its

buildings had been owned partly by Joseph Keilbach and partly by his wife. A transfer had been prepared and executed in 1909 from Mrs. Keilbach to her husband of the portion of the land owned by her, and a transfer from Joseph Keilbach to the glass company had also been prepared and executed but the documents could not be registered owing to some difficulty with regard to a roadway, referred to in one of the transfers, which had not yet been authorized as a legal roadway by the municipality. The transfers had been deposited with E. L. Taylor as solicitor for both Turner and the glass company at the time, so that the glass company were at least equitable owners of the land.

It will be observed that in the option no reference whatever is expressly made to the lands in the south-east quarter of section 35. No doubt all parties assumed, and I think properly assumed, that the ownership of the real and personal property already vested in the companies respectively would pass with the ownership of the shares.

The plaintiff promptly transferred the north-east quarter of the section to the purchasers and they in turn transferred it to the glass company. The shares of both companies were duly acquired and transferred to the purchasers. On January 7th, 1911, Joseph Keilbach executed a transfer to the Manitoba Glass Manufacturing Company, Limited, of all his estate and interest in certain described lands in the south-east quarter of section 35.

Mr. Moran, solicitor for the purchasers then, for the first time searched the title to these lands in the south-east quarter and accepted this transfer as satisfactory on behalf of the purchasers. It was accordingly duly registered.

In January, 1912, a reconstruction of the glass company was effected, whereby the capital stock was increased from $300,000 to $1,000,000, of which $600,000 was created preference stock.

Joseph Keilbach was the original founder of the glass company and he was a large shareholder therein. When the company was re-constructed Keilbach, having great confidence in the new management, agreed to give up his 1,400 shares in the old company (capitalized at $300,000 as aforesaid) in exchange for a similar number of common shares in the re-constructed company (having a capital of $1,000,000 as aforesaid.)

In September, 1912, the glass company agreed to sell out their property to the Diamond Flint Company, which took possession on October 1st, 1912. On October 19th this latter company, upon searching the title to their newly acquired property, discovered that there was no title to the land c-cupied by several of the glass company's buildings, the defect amounting in all to about eight acres.

The solicitors for the glass company found that an old transfer from Mrs. Keilbach to Joseph Keilbach, which had remained for years in the custody of E. L. Taylor, had been obtained a few days earlier by James D. Crawford, solicitor for the Keilbachs, and it was absolutely necessary for the glass company to obtain this old transfer or a new one from Mrs. Keilbach in order to prevent a repudiation of the contract of sale by the Diamond Flint Company.

Crawford took the position that his client had been imposed upon in being given only common shares of the newly constructed company when he was just as much entitled to preference shares as the defendants themselves, and he refused to deliver up Mrs. Keilbach's old transfer, or to advise her to execute a new one, except on the terms that the defendants should give to Keilbach 1,400 preference shares in exchange for the common shares. This was accordingly carried out.

The defendants seek to recover from the plaintiff $12,740, as being the alleged value of the 1,400 preference shares which they were compelled to give to Keilbach. The plaintiff's contention is that all his liabilities under the original option agreement of September 14th, 1910, had been carried out and completed to the satisfaction of the defendants long before the transaction complained of.

A large amount of oral evidence was given by witnesses on both sides at the trial, and it appeared to me that from the time the defendants agreed to purchase from the plaintiff in September, 1910, down to at least the date of the transfer given by the plaintiff in January, 1911, to the defendants, the plaintiff had always shewn a willingness to assist in carrying out the agreement on his part to the best of his ability.

If there was any mistake in the description contained in that transfer, it should have been discovered by the defendants' solicitors at the time, as it was subsequently discovered

by the Diamond Flint Company. The plaintiff who was also managing director of the glass company was surely justified in supposing that his transfer was accepted as sufficiently satisfactory.

I think it unnecessary to deal with the oral evidence given by the parties, conflicting as it is in many particulars. In my opinion the question before me may be decided wholly upon undisputed documents.

Under the original agreement of September 14th, 1910, the plaintiff agreed to convey the north-east quarter of section 35, which at that time he owned, and he duly conveyed it. As regards the properties, whether real or personal, owned by the Manitoba Glass Manufacturing Company, Limited, and the Manitoba Pressed Brick Company, Limited, the plaintiff agreed to sell them in these words: "All shares, stocks (issued or unissued), securities, franchises, rights, accounts, buildings, plants, ways, machinery, railway spurs, sidings, tools, goods, chattels, effects and assets."

In an agreement made on the 13th of September, 1911, between Cameron, McGavin and Moran, as vendors, and the glass company, as purchasers, above referred to, I find the following recitals:—

"Whereas the vendors are the absolute owners of the following:—

"1. All that certain parcel or tract of land at Beausejour, in Manitoba, containing about one hundred and twenty-five acres, and particularly described in certificate of title No. 151535.

"2. All the issued shares of the capital stock of the Manitoba Pressed Brick Company, Limited, consisting of 395 shares;

"3. All of the issued shares of the capital stock of the above named purchasers consisting of 1045 shares;

"4. All other securities, franchises, rights, accounts, buildings, plants, ways, machinery, railway spurs, sidings, tools, goods, chattels, effects and assets of the said the Manitoba Pressed Brick Company, Limited, and the above named purchasers, &c."

It will be observed by comparing the two documents, that the vendors acknowledge themselves on the date of this agreement to be the absolute owners of all the land, shares and other property material to this counterclaim, which the

plaintiff had agreed to sell under the so-called option agreement of September 14th, 1910. The document is executed by all three vendors and appended to it is the written approval of the plaintiff Turner.

I think it is idle for the defendants to now set up that Turner failed in any respect to comply with his obligations under the agreement of September 14th, 1910. The preference stock was not even created until January, 1912, so up to that time no objection could have been raised by the Keilbachs to sign or to deliver up to the defendants any documents which might be thought necessary in order to complete title to the land in question.

If Keilbach's solicitor acted improperly in obtaining the old transfer (from Mrs. Keilbach to her husband) from Taylor's office, the defendants or the glass company might have taken any proceedings they wished to repossess themselves of the document; but I do not think they can in any way hold the plaintiff liable in connection with the matter.

In the absence of the above clear admission in the agreement of September 13th, 1911, I should have come to the same conclusion on the evidence.

The plaintiff will have judgment, as conceded at the opening of the case, for the amount of his claim with costs. The counterclaim must be dismissed with costs.

BRITISH COLUMBIA.

SWANSON, Co.C.J. JANUARY 23RD, 1915.

TRIAL.

BAUMAN v. CORSBIE.

Sale of Land—Action for Purchase Money—Counterclaim for Rescission and Damages—Fraud and Misrepresentation—Evidence—Representations in Other Transactions—Practice—Form of Judgment.

In an action by a vendor for purchase money the defendant alleged that he had been induced to buy by the fraudulent misrepresentations of the vendor and his agents, and he counterclaimed for repayment of the cash deposit, rescission of the contract, and damages:—

Held, upon the evidence, that there had not been any misrepresentations, and that in dealing with this question evidence of representations alleged to have been made by the vendor on the sale to other persons of adjacent similar lots, was not admissible.

The agreement contained a provision in the usual form for forfeiture of payments in the event of default and for termination of the agreement. The plaintiff's title was registered and unencumbered, and the amount due was definitely ascertained, and the defendant was in possession:—

***Held*, that the judgment should be for (*a*) payment to the plaintiff of the amount claimed with interest and costs, (*b*) foreclosure in default of payment within six months, (*c*) vacation of registration of the agreement, (*d*) forfeiture to the plaintiff of moneys paid, and (*e*) delivery of possession to the plaintiff.**

***Lee* v. *Sheer* (1914), 30 W. L. R. 273, and *Hargreaves* v. *Security Investment Co.* (1914), 29 W. L. R. 32, considered.**

G. W. Black, for plaintiff.

A. D. Macintyre, for defendant.

SWANSON, Co.C.J.:—The plaintiff sues for the balance owing under an agreement for sale made between the plaintiff as vendor and the defendant as purchaser of lots 2 and 3 in block 12, lying on the south bank of the Thompson River in Kamloops. In March, 1913, defendant inspected the lots in question with Laidlaw, who is associated with Tripp in his real estate business here, the plaintiff's selling agent. After a number of conferences with Tripp and Laidlaw, the defendant concluded the deal to purchase these lots by executing an agreement for sale, March 29th, 1913. The price agreed to be paid was $1,200, cash $300, payable on the execution of agreement, $300 on July 26th, 1913, $300 on November 26th, 1913, and balance, $300, on March 26th, 1914, with interest at 8 per cent. per annum, it being agreed therein that time is of the essence of the agreement and "unless the payments above mentioned are punctually made at the time and in the manner above mentioned, and as often as any default shall happen in making such payment, the vendor may give to the purchaser thirty days' notice in writing demanding payment thereof, and in case any such default shall continue, these presents shall, at the expiration of such notice (if the vendor shall so elect), be null and void and of no effect, and the vendor shall be at liberty to repossess, resell and convey the said land to any purchaser thereof, and all the moneys paid hereunder shall be absolutely forfeited to the vendor as liquidated and ascertained damages." No further payment, except the cash payment of $300, has been made. The said payments and interest were all in arrear at date of suit, July 8th, 1914. Defendant now by way of defence alleges misrepresentation by plaintiff's agents, and in his counterclaim asks that the agreement be

set aside and an order made for the return of the money paid and also for payment by way of damages of the sum of $700, being the value of a dwelling-house erected on said lots by defendant and also the additional sum of $500 as general damages.

The defendant had been but a short time in Kamloops before purchasing, having come from Saskatchewan, where, he says, he lived for some sixteen years alongside the Assiniboine River. He says he was pleased with the property he purchased in Kamloops, being similar riverside property to what he had been accustomed, until the high water came in 1913, when, he says, his property was flooded by the rising of the Thompson River, leaving only a small portion at the top of a ridge, some 15 to 17 feet in width, out of water, the high-water condition continuing for some weeks and then the water receding leaving the lots entirely dry again. But for this, the property is satisfactory, but with this condition, the defendant claims, the property is useless for the purpose for which he purchased it, viz., as a site for a dwelling.

As to the misrepresentation alleged, I will quote the words of the witnesses: [The learned judge here gave quotations from the evidence.]

Although other allegations of misrepresentation are set forth in the defendant's dispute note and counterclaim, the above are practically the allegations complained of in the evidence before me.

It is well known, as the evidence shews, that there was a great flood in 1894 all along the Thompson Valley and that the section of country in which the lands in question lie was completely submerged. This is a matter of great notoriety in this district, and Tripp swears he brought it to the defendant's attention. The defendant's counsel, in his written argument, takes the position that both sides agree that the great flood of 1894 was spoken of, a position which the defendant, however, denies. I am quite satisfied that on this point the defendant is mistaken. As to the allegation of the defendant that Tripp assured him "You need not be scared of the water, as he was sure the water would never bother me." even assuming the correctness of the defendant's evidence on this point, I hold that this would not constitute in law a representation, being merely "statement of opinion, judgment, probability or expectation" (see Kerr on Fraud and Mistake, 4th ed., page 49; Halsbury, Laws of England,

vol. 20, page 664). Apart from this allegation, the defendant's case rests on the allegation that the plaintiff's agents represented to him that the highest point to which the water had ever risen on these lots was that indicated by the line on the map, "extreme high-water mark," a statement which, he alleges, he relied on and which he says was untrue. This is a material representation and if it were established to my satisfaction as having been made to the defendant, in view of the fact that I am satisfied on the evidence that the water has come up to a higher point, on one occasion at least, in 1894, completely submerging the lots, I think the defendant should succeed. But, in view of the conflicting evidence, which I have considered with great care, I find that the defendant (who is the plaintiff in the counterclaim) has not discharged the burden of proof that such misrepresentations were made. Both Laidlaw and Tripp give a flat denial to these statements. I am impressed particularly with the evidence of Tripp. [The learned judge here quoted it.]

I find as a fact that no such misrepresentations as alleged by the defendant were made by the plaintiff or his agents, Tripp and Laidlaw. I am satisfied Tripp informed Corsbie of the flood of 1894, and also that he specifically pointed out to him that the stakes marked "extreme high water" referred only to the year in which the survey was made, 1911, and that neither Tripp nor Laidlaw represented to the defendant that the water had not ever risen above the said stakes. I am of the opinion that the evidence of Lyon and of Atkins as to alleged similar misrepresentations made by the plaintiffs' agents in selling to them other nearby lots in this block 120, is not admissible for the reason set out in Halsbury's Laws of England, vol. 13, pages 45 and 451. "The rule is based . . . on the inconvenience and delay its admission might occasion since it would tend to confuse the jury by raising collateral issues and prejudice the parties by permitting attacks to be made without notice." Rex v. Whitehead (1848), 3 Car. and Kir. 22 (question whether surgeon performed an operation negligently, evidence that he had been negligent or skilful in performing similar operations on other patients rejected), and see Holcome v. Hewson (1810), 2 Camp. 391 (question whether a brewer supplied good beer to a publican, evidence that during period in question he supplied good beer to other publicans rejected). If this evidence were legally admissible, as defendant's coun-

sel strongly argued, it is worthy of note in passing that Lyon corroborates Tripp's statement that the stakes in question were put in by the surveyor to mark the high water of the season of 1911: see pages 77 and 80. Also see evidence of Atkins, at p. 86, and p. 89. But I disregard the evidence of both Lyon and of Atkins and make my finding on the balance of the testimony. On a careful survey of the whole case, I find no grounds for setting aside this contract. Claims of this kind set up by the defendant are being frequently met within our courts now that the real estate activity has subsided. I find no misrepresentations proved and I cannot see how the court can correct the defendant's error of judgment.

I would beg to repeat the words of Sir Nathaniel Lindley, M.R., as to the inviolability of contract where there has been shewn no duress, undue influence, fraud or misrepresentation, in Underwood v. Barker (1898), 68 L. J. Ch. at p. 28, and also the words of Sir George Jessel, M.R., in one of his latest judgments—Wallis v. Smith (1883), 52 L. J. Ch. 153, where he speaks of the duty of the court to maintain the performance of contracts between adults in such cases according to the intention of the parties—a bargain solemnly entered into between intelligent adult people should not be lightly set aside, and only indeed for the clearest and most cogent legal reasons. The plaintiff is, in my opinion, entitled to judgment dismissing the counterclaim with costs. The plaintiff is also entitled to judgment on his claim with costs. There is apparently a difference in the practice as to the form which the decree in such a case as this should take in view of the conflicting decisions of the appellate divisions of the Supreme Courts of Alberta and of Saskatchewan: Lee v. Sheer (Alta.), 30 W. L. R. 273, and Hargreaves v. Security Investment Co. (Sask.), 29 W. L. R. 32. In the Alberta case, Mr. Justice Beck, in giving the judgment for the Court en banc, reverses his own previously expressed view in Shurman v. Ewing, 7 W. L. R. 61, referred to in the Saskatchewan case. In view of this conflict of judicial opinion, I think, with all respect, I should continue to follow the practice of this court, which is in accordance with the view expressed in the Hargreaves case, until the practice is finally determined in our own Court of Appeal. As the plaintiff's title is registered and unencumbered and not in dispute, and the amount owing is definitely ascertained, there will be judgment for the plaintiff for the amount claimed, with interest

and costs of action, and that if the same is not paid into court within six months from the entry of judgment herein, the defendant do stand absolutely debarred and foreclosed of all his estate, right, title, claim or demand in or to the lands and premises in question, and that any registration of the agreement of sale herein in the Land Registry Office be vacated and all moneys paid thereunder be forfeited to the plaintiff and the plaintiff be at liberty to repossess said lands and premises.

SASKATCHEWAN.

ELWOOD, J. FEBRUARY 3RD, 1915.

RE ELLIOTT.

Practice—Mandamus—Affidavit in Support of Application—Who Must Make — Filing of, Condition Precedent — Crown Practice Rule 25—"Prosecutor."

The word "prosecutor" in Crown Practice Rule 25 means the applicant for the writ of mandamus.

The affidavit required by Crown Practice Rule 25 to be produced on an application for an order for the issue of a writ of mandamus must be made by the applicant himself, and not by his solicitor.

Under Crown Practice Rule 25, the filing of the affidavit mentioned therein is a condition precedent to the granting of a writ of mandamus and, accordingly, where a proper affidavit is not produced on an application for a writ of mandamus, leave will not be granted on the said application to file a further affidavit.

Blair, for applicant.

McLean, for respondent.

ELWOOD, J.:—This is an application to shew cause why a writ of mandamus should not issue requiring the judge of the district court of Regina to set aside the order made by said judge dismissing with costs the appellant's appeal from an order of two justices of the peace made requiring the appellant to pay to the respondent the sum of $50 and costs under the provisions of ch. 149 of the Revised Statutes of Saskatchewan.

The application before me is made upon the affidavit of T. J. Blain, solicitor for the appellant Elliott. There was no

affidavit of Elliott. A number of objections were taken to the sufficiency of the material of the applicant but, in view of the conclusions I have come to, it is only necessary that I should consider one of these objections which is that by Rule 25 of our Crown Practice Rules:

"No order for the issuing of any writ of mandamus should be granted unless at the time of the application an affidavit be produced by which some person shall depose upon oath that such application is made at his instance as prosecutor and, if the writ be granted, the name of such person shall be endorsed on the writ as the person at whose instance it is granted."

It was contended on behalf of the applicant that that Rule did not apply to this case; that the applicant in this case was not the prosecutor in the original proceedings but the defendant. I am of the opinion that the word "prosecutor" in the above Rule means the applicant for the writ of mandamus.

It was contended further on behalf of the applicant that an affidavit made by the solicitor for the applicant is sufficient and reference was made to the case of Regina v. Mayor of Peterborough, 44 L. J. Q. B. 85. Rule 76 of the English Crown Office Rules 1886 is practically the same as our Rule above referred to; see Short and Mellor, 1st ed., p. 526. These rules were subsequently amended in 1906 and Rule 65 was substituted for Rule 76. Rule 65 is as follows:

"No order for the issuing of any writ of mandamus shall be granted unless at the time of moving an affidavit be produced made by the applicant himself or his solicitor stating at whose instance such motion is made as prosecutor." See Short and Mellor, 2nd ed., p. 243. The rules above referred to passed in 1906 repealed the rules of 1886. See Short and Mellor, 2nd ed., p. 10.

Prior to 1886 there were apparently some rules of the Supreme Court applicable to writ of mandamus. See Short and Mellor, 1st ed., p. 517, but I have been unable to obtain access to the rules. It was argued that a rule similar to Rule 76 above referred to was in force at the time of the decision of Regina v. Mayor of Peterborough, which was decided in 1875 and that that case was authority for the proposition that the affidavit need not be made by the applicant himself.

I cannot bring myself to that conclusion and from a perusal of that case I have concluded that no rule was in force requiring an affidavit to be made by the applicant. It seems to me, also, that the fact that Rule 65 was in 1906 substituted for the previous Rule 76, shews that at any rate between 1886 and 1906 the affidavit was required to be made by the applicant and an affidavit by his solicitor was not sufficient.

Mr. Blain himself is not the applicant and if it were argued that he is the applicant then the case of Regina v. Mayor of Peterborough is authority for the proposition that his affidavit is not sufficient, because the applicant must shew that he has a real interest in the subject-matter and, of course, it cannot be contended that Mr. Blain has any real interest in the subject-matter.

It was argued that the applicant should have leave to file a further affidavit. I think that this is more than a mere irregularity; that the filing of this affidavit was a condition precedent to the granting of the writ and that leave should not on this application be granted to file an affidavit of the applicant. See Kerr v. Sutor, 6 Terr. L. R. 255.

It was objected that there having been two adjournments of this application the respondent could not take the objection which he has taken. I understand that those adjournments were made, not at the instance of the respondent, but by the Chamber judge who refused to hear any contentious motions. Under these circumstances I am of the opinion that there was no waiver, if there could be a waiver, by the respondent of his rights.

For the above reasons, therefore, the application will be dismissed with costs.

Application dismissed.

MANITOBA.

METCALFE, J. FEBRUARY 2ND, 1915.

TRIAL.

STOUT v. KENNY.

Master and Servant — Sale of Goods — Servant Pledging Master's Credit — Implied Authority.

The defendant, who was a contractor carrying on large operations, owned a ranch where he kept horses and mules, when they were not required for the purposes of his business. The action was brought to recover $2,200 the price of a stallion which had, the plaintiff alleged, been purchased for the defendant by the man who had charge of the ranch for the defendant.

***Held*, upon the evidence, that express authority to purchase was not made out, and that though ranching operations were important, they were only incidental to the main enterprise of the defendant, and therefore that there was no implied authority in the servant to pledge the credit of his master to such a large amount, and to bind the master to a purchase of such a special nature.**

Arthur Meighen, K.C., for the plaintiff.

C. P. Fullerton, K.C., for the defendant.

METCALFE, J.:—The plaintiff is a farmer and a breeder of horses, residing near Westbourne. The defendant C. H. Kenny is a railway contractor doing business as C. H. Kenny & Co., residing at and having his head office at Winnipeg.

The plaintiff sues for $2,200, the purchase price of a stallion and for interest. He alleges he sold the stallion to the defendant. At the trial it appeared he had no dealings with Kenny direct. He bases his claim upon negotiations with one Green, who he argues was a servant of the defendant authorised to purchase.

The defendant owns a large contracting outfit, including many horses and mules. It being convenient to have some suitable place to winter such portion of his live stock as was not employed, and suitable at all times of the year to keep such horses, mules and other animals as became unfit, he secured for such purpose at Westbourne that property known as the "Sanford Ranch." When not at work contracting practically all the outfit, including about 140 to 150 teams of horses and mules, were kept at the farm.

Green had been subcontracting under Kenny. He says that in the spring of 1912 Kenny hired him to "run the ranch and to raise horses, cows and hogs." He also says that he bought some cows and horses, and that Kenny paid for them. Again, speaking of Kenny, he says: "Sometimes he said it is a little expensive."

Green bought a boar and at another time a bull. For this he himself paid. After some delay Kenny paid Green. Green claims that the reason for the delay was that Kenny said the money was tight and asked him to let it stand. Kenny denies this and says that he delayed payment for the bull until after he had made inquiries at the farm and had satisfied himself that the bull was valuable.

Some mares were left on the farm in 1912, when the contracting outfit left. About ten were bred to a stallion. Green says they contemplated breeding twenty mares in 1913. This Kenny denies. As a matter of fact, a small number only were left when the railway outfit departed.

The plaintiff says that Green had seen him at the Brandon Fair, where he had exhibited the stallion; that he had then told Green the price of the stallion; that on March 11th, 1913, Green came to see him. Concerning this interview the plaintiff says: "So I said to him, how are you going to settle for this? Well, he explained, Mr. Kenny was away at the time, that he would give a personal note and as soon as Mr. Kenny was back we would go down together and get Mr. Kenny's signature on the note, or he would take the discount that I had offered, but he thought he would take the discount so we left it at that." Thereupon the plaintiff drew up two notes, bearing date March 11th, 1913, for $1,100 each, maturing in one and two years respectively, with interest at 8 per cent. until due and 10 per cent. afterwards until paid. The stallion was then delivered to Green.

Green swears that he had told Kenny that he was going to the Brandon Fair and that he would try and buy a stallion and that Kenny was silent; also that at another time Kenny asked him what a good horse would cost, and that Green said $1,800 to $2,000; that Kenny had said that if they got a stallion they would get a good one. All of this Kenny denies.

Green says:—

"Q. What did you do in regard to that horse? A. I bought him from Mr. Stout.

Q. Did you buy him for yourself? A. No, for Kenny & Co.

The Court:—When was that? A. The 11th.

Q. What did you buy him for? A. I think $2,200.

Q. How was that to be payable? A. In two years; the first year half with interest and the second year half with interest.

Q. Interest at what rate? A. 8 per cent. I think.

Q. Were any papers signed? A. Yes.

The Court:—Where was Mr. Kenny on March 11th? A. I don't know; he might have been in Winnipeg or in the bush.

Q. What do you mean by the bush? A. They had camps: he would be gone 3 or 4 days then back in Winnipeg.

Q. What was signed? A. I put my name on a note."

Later Green says:—

"Q. In the meantime what was to be done? A. I told him. I said, I will just put my name on this piece of paper; that the company must sign this note before it is any good; I practically put my name on the paper to shew I bought the horse."

In cross-examination Green says:—

"I told Mr. Stout that I was putting my name on the note and that Mr. Kenny would have to sign it or it was no good, that I am putting my name on so that the company can see it the same as if he had an order."

He admitted that he did not know much about stallions, that he never took care of one and that he was not an expert in horses.

It does not appear that the plaintiff made any inquiry or took any means to ascertain the authority of Green to purchase the stallion.

On the 29th of March the horse was taken ill and shortly after died.

No satisfactory explanation is given as to why the plaintiff did not take the matter up direct with Mr. Kenny and get a confirmation of the sale. It is suggested that perhaps Mr. Kenny was in the bush, but he had an office and I have no doubt that the plaintiff could have got into communication with him.

Green admits that Kenny has always said he would not pay for the horse.

The evidence of Green and Kenny is very contradictory. At nearly every material point they disagree.

Shortly after the horse died Green was in Winnipeg at Kenny's office. Kenny says Green told him that when he bought the stallion he told the plaintiff that unless Mr. Kenny signed the notes "it was no good and no sale." This Green denies; but Kenny is supported by his bookkeeper who heard the conversation. I believe Green did make that statement. It is inconsistent with the stand he takes at the trial. In any event I hesitate to accept his evidence. The business was largely that of contracting and the farming operations, while considerable, were, I think, incidental only to the main enterprise. I do not think there is any express authority. Neither do I think there is authority implied.

I think the purchase of a stallion was not necessary for the purpose of the operations carried on at that farm. The price is large. The credit of the master is to be pledged. All this now seems only an incident to Green. It is hardly necessary to add that Green is not now in the employ of the defendant Kenny.

There will be judgment for the defendant with costs.

MANITOBA.

METCALFE, J. FEBRUARY 2ND, 1915.

TRIAL.

J. I. CASE THRESHING MACHINE COMPANY v. WRENSHALL.

Sale of Goods—Conditional Sale—Resale by Conditional Purchaser with Conditional Vendor's Assent—Guarantee by Conditional Purchaser.

Goods sold under a conditional sale agreement were sold by the conditional purchaser to the defendants at a price larger than the amount due to the conditional vendor. The conditional vendor assented to the sale, and the defendants agreed to pay to it the amount of its claim. Judgment was given in the conditional vendor's favour for this amount, and it was *held* that it was not concerned with the contention of the defendants that the conditional purchaser had given to them a guarantee as to the condition of the goods and that this guarantee had been broken.

C. P. Fullerton, K.C., and F. E. Simpson, for plaintiff.

Arthur Meighen, K.C., for defendants.

METCALFE, J.:—The plaintiff, a corporation, sues on two lien notes made by the defendants in favour of the plaintiff, each dated March 31st, 1913, one for $620, maturing October 1st, 1913, and one for $380, maturing October 1st, 1914.

The defendants, in their statement of defence, say that the notes were given for the following goods: 1 Case second-hand engine; 1 separator; 1 old separator; and 1 gang plow. They allege the engine was to be delivered by the plaintiff in first-class condition; traction to be refaced and certain other repairs; also that the gang plow was to be delivered with share sharpened and in good repair. They further say that, although the engine was delivered, it was not repaired; that it was utterly unfit, and that the gang plow was neither repaired nor delivered.

In reply, the plaintiff says that the engine and separator were sold to the defendants by one J. McDonald, to whom the same had been sold by the plaintiff under a lien then existing. Plaintiff denies that it sold to the defendants. The plaintiff also denies the agreement as to repairs, and further says that the full terms of the agreement are in writing.

At the trial, it appeared that McDonald offered to sell the defendants the threshing outfit, consisting of the engine and one separator, for $1,000, and that later he agreed to include the old separator and the gang plow.

There being a lien upon the engine and separator, McDonald and the Wrenshalls went to Ochre River to meet Ingleton, a collection agent of the Case Company, for the purpose of arranging the lien and concluding a sale of the property. The Wrenshalls both say that, before going to meet Ingleton, McDonald had guaranteed the property to be in good shape, and that he agreed to make certain repairs. McDonald denies this. The Wrenshalls both say that such agreement was fully gone into before Ingleton. Both McDonald and Ingleton deny that.

McDonald then owed the Case Company $620, all of which was overdue. The defendants say that Ingleton told them that the Case Company would accept the new terms, taking a note for $620 for what was due to them, and a note for $380 for what was due to McDonald. Ingleton also denies that statement. On this point, I accept the evidence of the defendants, Wrenshall. In a subsequent chattel mortgage

from one of the Wrenshalls to the Case Company, the indebtedness is recited as $620, which clearly substantiates this view.

The price for all the goods, some of which were not subject to the Case lien, was $1,000. For some reason, Ingleton prepared an order form in writing whereby the Case Company purported to sell the engine and separator only for $1,000 to the Wrenshalls. The time was extended as follows: $620 October 1st, 1913; $380 October 2nd, 1914.

During the evidence, it was conceded that the writing did not express the true agreement.

The $380 does not belong to the plaintiff: it is really the money of McDonald. The plaintiff does not now press for judgment for the $380.

I do not think I should here express an opinion as to whether or not the Wrenshalls have established either a guarantee against McDonald; an agreement to repair, or a failure to deliver the gang plow. That is not, I think, a question that I can now either conveniently or properly try; but, in any event, I am convinced that if any such agreement existed between McDonald and the Wrenshalls, or if there was a failure to deliver the gang plow, that none of these matters were ever intended to operate against the Case Company. By the new arrangement, the plaintiffs extended the time for payment and consented to the transfer. In all probability, the $380 coming to McDonald over and above the Case claims was ample protection against the alleged agreement to repair.

I, therefore, find that the defendants agreed to pay to the plaintiff the $620 and interest, and that there was sufficient consideration therefor.

I think there is a real question to be tried as between the defendants and McDonald, not only as to the alleged guarantee or agreement to repair, but also as to the non-delivery of the gang plow. Here neither the issues raised nor the evidence enable me to decide these matters so as to do justice as between the defendants and McDonald. As the plaintiff very reasonably does not press for this $380, I will leave that matter to such further action as may be taken.

There will be judgment for the plaintiff for $620, with interest and costs.

MANITOBA.

GALT, J. JANUARY 28TH, 1915.

TRIAL.

PATERSON v. MACNEIL.

Vendor and Purchaser—Sale of Land—Purchase Money Payable in Instalments—Purchaser Refusing to Continue Payments Because Moneys Previously Paid Wrongly Applied by Vendor in Payment of Taxes—Acceleration Clause.

By an agreement in writing the plaintiff agreed to sell and the defendant agreed to buy certain land which the plaintiff had previously agreed to sell to another person. Some payments had been made by the first purchaser, and the new agreement was made with his assent, the expressed consideration being the balance unpaid of the original purchase price. The defendant agreed to pay taxes from the date of the agreement. The purchase money was payable in small instalments, and after several instalments had been paid the plaintiff demanded from the defendant a sum for taxes which the defendant paid. Subsequently he ascertained that the taxes were due in respect of a period prior to the date of his purchase, and he demanded repayment or credit, and on the plaintiff refusing either the defendant declined to pay any further instalments of purchase money, and this action was brought for the whole unpaid balance, the agreement containing the usual acceleration clause:—

Held, that both parties were in the wrong, the defendant clearly not being liable for the taxes in question, but that the wrongful casting of liability upon him in this respect did not justify him in refusing to make the payments in accordance with his agreement.

Mersey Steel and Iron Co. v. *Naylor*, 9 App. Cas. 434, applied.

Judgment was therefore given for the plaintiff for payment of the purchase money and for sale in default of payment, and for the defendant for repayment of the taxes, no order being made as to costs.

T. L. Hartley, for plaintiff.

M. G. Macneil, for defendant.

GALT, J.:—The plaintiff brings this action upon an agreement of sale, dated the 1st day of May, 1913, whereby the plaintiff agreed to sell certain lands in Winnipeg to the defendant for the sum of $4,038.35, payable as follows: $1,950 by the purchaser assuming a mortgage for that amount, with interest thereon at 8 per cent. per annum from the 1st day of December, 1912, now registered against said premises in favour of the Capital Loan Company; the balance or the sum of $2,083.35 is to be payable at the rate of $25 per month from and including the 1st day of May to and includ-

ing the 1st day of October in each and every year and $20 per month from and including the 1st day of November to and including the 1st day of April in each and every year until the said sum is fully paid and satisfied; the first of such payments of $25 to be made on the 1st day of May, 1913, and the first of such payments of $20 to be made on the 1st day of November, 1913.

It appears that the plaintiff had agreed to sell the lands in question to one James, but after payments had been made by said James for some time, this new deal was arranged betwen the plaintiff and defendant, with the consent of James, and the purchase money was adjusted on the basis of the accounts which were outstanding between the plaintiff and James.

A statement was furnished by the plaintiff's solicitor to the defendant at his request, setting forth the amounts claimed to be due, amounting in all to $4,038.35. Nothing was shewn to be due for taxes. Accordingly, the amount so appearing in the statement was expressed as the consideration in the agreement between the plaintiff and defendant and said agreement also contained an express covenant by the purchaser "to pay taxes from and after the 1st day of January, 1913."

The defendant or his brother entered into possession of the land and premises and certain payments were made on account.

On November 20th, 1913, the plaintiff's agent, A. C. Matthews, requested payment from the defendant of the sum of $107.37 alleged to be due for taxes on the property, and the defendant states that Matthews informed him that unless this amount were paid at once, the property was liable to be sold for taxes. The defendant further states that he was very busy at the time and assumed that there was an immediate necessity for making this payment, and he gave his cheque for the amount accordingly. Later on, on thinking the matter over and upon looking over the terms of the said agreement, the defendant found that there must have been an error in his being called upon to pay the above taxes. Accordingly, on November 21st, 1913, he wrote plaintiff's solicitor, pointing out this error and requesting that Mr. Paterson refund the amount.

It turned out that the taxes in question were for the years 1911 and 1912, for which the defendant was not in

any way liable. Notwithstanding this, the plaintiff and his agents declined to accede to the defendant's request, upon the ground that the taxes in question were properly payable by James, the original purchaser, and should have been assumed by the defendant.

The defendant endeavoured to reimburse himself by deducting the $107.35 from an amount of $133.05 due from him upon a note to the plaintiff, but the plaintiff declined to recognize this payment, and yet insisted on retaining the amount of the defendant's cheque for the balance. Thereupon the defendant took the position that he would refuse to make any more monthly payments until said note was returned to him, and he acted accordingly.

Payments accrued under the agreement, one of which was due to the Capital Loan Company on their mortgage, but the defendant refused to pay. Accordingly, on the 8th of May, 1914, the plaintiff brought this action, claiming (under the usual acceleration clause in the agreement): (a) payment of $2,171.98: (b) a declaration that the plaintiff has a lien for said money: (c) that in default of payment within a time to be set by this court, that the lands may be sold and the moneys applied in payment of said lien; (d) further and other relief.

The defendant, in his defence, does not deny any of the plaintiff's allegations, but sets up a defence and counterclaim based upon the improper payment of $107.35 above mentioned.

I find upon the evidence that the plaintiff was not justified in demanding and receiving the $107.35 from the defendant for the taxes for 1911 and 1912 as the defendant was not liable for such taxes. Upon the refusal of the plaintiff to return the money, the defendant might have recovered it in the county court, together with costs.

On the other hand, I find that the plaintiff's refusal to return this money did not justify the defendant in refusing to carry out the other obligation he was under in accordance with the terms of the agreement. It is true that the defendant states that at a late stage of the dispute, he saw Mr. Paterson and offered to pay the monthly payments and reserve the question of the payment of the $107.35; but that Mr. Paterson told him he could save himself the trouble, because he, Paterson, would not accept any payments until the note was paid off. Such a statement, if made, would not

relieve the defendant from paying the interest due to the Capital Loan Company, which he had undertaken to do. An improper refusal by a party to a contract to pay one of several obligations provided for does not relieve him from making the other payments: See Mersey Steel and Iron Co. v. Naylor, 9 App. Cas. 434. If the defendant desired to rely upon any such statement as the one alleged to have been made by Mr. Paterson, he should at least have tendered the overdue payments.

There is in truth no defence to this action, either on the pleadings or evidence. Consequently, the plaintiff is entitled to the relief which he seeks, subject to the restrictions provided for in sec. 4 of the Moratorium Act. No execution or certificate of judgment can be enforced by the plaintiff until the expiration of six months from the coming into force of the Moratorium Act. Nor can any relief be granted by way of sale, inasmuch as sec. 2 of the Moratorium Act provides that all proceedings for the sale of any land under any power of sale or otherwise existing are stayed until after the lapse of six months from the 1st day of August, 1914.

As regards the counterclaim, I think the defendant is entitled to the relief which he seeks.

There will be no order as to costs.

SASKATCHEWAN.

LAMONT, J. FEBRUARY 8TH, 1915.

TRIAL.

SCHRADER ET AL. v. MANVILLE ET AL.

Vendor and Purchaser — Agreement for Sale of Land — Agent of Vendor Joining in Purchase—Fraud—Secret Profit—Action for Balance of Due Instalment—Payment Made After Notice of Fraud — Election to Affirm Contract—Personal Judgment—Necessity for Proving Title —In Default of Payment Within Certain Time Purchaser's Interest Foreclosed.

S. and W. obtained from the vendor an option to purchase certain property at $28,000. They induced defendants to join them as co-purchasers, representing that the option was for $32,000. The vendor upon the request of S. agreed to give S. and W. a new option for $32,000 on the understanding that vendor would still take $28,000 and pay over to S. and W. the extra $4,000 by which the option had been increased. An agreement of sale was accordingly drawn up.

Held, that the vendor was guilty of fraudulent conduct, which entitled defendant, upon discovery of the fraud, to elect whether they would affirm the contract or rescind it.

Hitchcock v. *Sykes*, 13 D. L. R. 548, 49 S. C. R. 403, referred to.

But *held*, upon the evidence, that the defendants' claim for rescission failed since, after being aware of the facts constituting the fraud, they elected to affirm the contract.

It is only where a purchaser has accepted the title of the vendor, or has in his contract expressly agreed to pay irrespective of the vendor having title, that the court will decree payment without the vendor having first shewn a good title and thus satisfy the court that he is able to deliver the property if the defendant pays the purchase-money.

Landes v. *Kush*, 28 W. L. R. 915, followed.

Held, that vendor was entitled to have a time fixed within which defendants must pay and upon default that the interest of defendants be foreclosed.

Action for the balance of an instalment due under an agreement for the sale of land.

G. H. Yule, for plaintiffs.

C. E. Gregory, K.C., for defendants. Manville, Jack, and Moorhouse.

LAMONT, J.:—By an agreement in writing dated March 1st, 1912, the defendants agreed to purchase from the plaintiffs the south-west quarter of section 3, township 48, range 26, west of the third meridian, for $32,000, payable $8,000

cash, and $8,000 on the 15th day of December, in the years 1912, 1913 and 1914. The defendants paid the first two payments and a portion of the payment falling due in December, 1913, but failed to pay the balance of that instalment. This action is brought for that balance. To the action the defendants Woods and Stockton have entered no defence. The defence of the other defendants is that they were induced to enter into the contract by false and fraudulent misrepresentations made to them by the defendants Woods and Stockton, who were the plaintiff's agents to bring about a sale. The facts as disclosed by the evidence are as follows:—

On March 1st, 1912, the defendant Stockton obtained from the plaintiffs an option on the above described land at $28,000, which was good until April 1st. Near the end of March the defendant Woods went to the office of the defendant Moorhouse, who was a real estate agent in Prince Albert, and listed the land with his clerk in the absence of Moorhouse at $250 per acre. When Moorhouse returned Woods saw him and told him they had an option on it at $32,000 and had a one-eighth interest not then taken up. He said the option expired on the following Monday, and asked Moorhouse to come in as purchaser and take the one-eighth interest. Moorhouse agreed. Later Woods came back and said that his friends in Saskatoon who were to take a one-half interest had fallen down on the deal and they would have to place that one-half interest elsewhere. Moorhouse said he would see some of his friends in Prince Albert, which he did, with the result that the other defendants agreed to go into the deal and become purchasers along with Woods, Stockton and Moorhouse. Woods having arranged a sale to the defendants, Stockton went back to the plaintiffs, who live in Saskatoon, and said he could not take up the option at $28,000, but if the plaintiffs would give him an option at $32,000 he could effect a sale, but it would be on the understanding that the plaintiffs still took $28,000 for the property and that they would pay over to himself and Woods the extra $4,000 by which the option was being increased. The plaintiffs agreed to this, and gave Stockton a new option at $32,000 dated back to March 1st. On April 1st, Moorhouse, acting for himself and his friends, went to Saskatoon to close the deal. Stockton shewed him the option at $32,000. The agreement now sued on was then drawn up by one of the plaintiffs and executed, and Moorhouse

paid over the amount of purchase-money due from the defendants except that from Stockton and Woods. On the following day the plaintiffs executed an agreement in writing by which the plaintiff agreed to pay Stockton and Woods the sum of $1,333.33 out of each instalment of $8,000, payable by the defendants on December the 15th, in each of the years 1912, 1913 and 1914. The plaintiffs admit that when they gave the option at $32,000 they knew that it was to be used to effect a sale at that price, and that they were to hold themselves out to the purchasers as selling for that sum. The defendants paid the cash payment and the payment due in December, 1912. By the time the next payment had fallen due, in December, 1913, the defendants had heard rumours of the increase of the price to them by $4,000. On December 23rd, 1913, the plaintiff Schrader wrote to the defendant Moorhouse informing him of the two options. That letter contains the following statement: "In regard to the options, I beg to say that the original option to purchase was made between myself, Messrs. Sparling and Davis and F. H. Stockton for $28,000. Later another option was made for $32,000 and Woods and Stockton have a commission agreement for $4,000." On receiving this information, the defendants consulted their counsel in reference thereto, but were advised that, without more evidence, they could not successfully resist payment of the balance of the purchase money. On January 14th, 1914, Moorhouse received from Schrader the original option at $28,000. For some reason he seems to have taken no action in reference to it. On March the 16th, Moorhouse wrote to Lock, the plaintiffs' solicitor, who had demanded payment of the instalment then due, that Mr. and Mrs. Mansell and P. R. Jack had promised payment on the following Saturday, and that he would forward Lock a substantial cheque by the end of the week. On March the 18th, he wrote again explaining the delay in forwarding the money and promising to write again the following Monday. This letter contains the following paragraph: "As you are aware, there are a number of assignments of the money due, and at the present time I do not know where we stand. R. W. Davis assigned his interest to the Mutual Securities Company, Limited, on the 21st January, 1914, which notice was received by me on the 21st January, 1914. You have assigned to the Northern Crown Bank. A. F. Simpson and the Stover estate, and there is an agreement between the

bunch of you and Stockton and Wood which we are recognizing." On March 21st he wrote again to Lock saying that all he had been able to collect was $4,700, and he enclosed cheques for that amount. On April 29th this action was commenced. On May 12th the defendants again consulted their counsel, and shewed him the option for $28,000, and instructed him to defend the action on the ground of fraud. On these facts the defendants say the plaintiffs were guilty of fraudulent conduct in colluding with Stockton and Woods to raise the price of the land on the other purchasers. On the other hand, the plaintiffs contend that even if it be held that their conduct was fraudulent, the defendants, after having full knowledge of the fraud, elected to affirm and carry out the contract.

That the plaintiffs, in arranging with Stockton and Woods to represent to the other purchasers that the price of the land was $32,000, when as a fact it was only $28,000, and in agreeing to pay over the additional $4,000, were guilty of fraud, is beyond question. The case of Hitchcock v. Sykes, 13 D. L. R. 548, very closely resembles the present case. In that case two propositions were laid down by the Ontario Court of Appeal. These, as set out in the headnote, are:

"Where an agent employed to sell property on commission himself joins with a third person in purchasing it at a price which is larger by the amount of the commission than that at which he could himself have bought the property, it is the duty of the vendor, when aware of the relation between the broker and the third person, to inform the latter of the existence of the agency and of the arrangement to pay a secret commission to one of the purchasers.

"Where one member of a partnership formed expressly to purchase certain property for which his associates furnished the money received a secret profit from the seller, who knew of the existence of the partnership, the defrauded persons may, on discovering the fraud, rescind the contract of sale and recover from the vendor all payments made to him."

The judgment in this case was affirmed by the Supreme Court of Canada, 49 S. C. R. 407, and leave to appeal to the Privy Council was refused. The plaintiffs, in the case at bar, knew before the agreement was executed that Stockton and Woods had joined the other defendants in purchasing the property in question, and they did not disclose to the

other purchasers the fact that they were paying a secret commission of $4,000 to these two men. The plaintiffs were therefore guilty of fraudulent conduct, which entitled the defendants, upon discovery of the fraud, to elect whether they would affirm the contract or whether they would rescind it. If they elected to rescind, they would be entitled to a return of the moneys they had paid. 20 Hals. 737. Did the defendants repudiate or affirm the contract after knowledge of the fraud?

They admit that they did not repudiate it before action was brought, and that the first intimation they made of repudiation was contained in their statement of defence. It is also admitted that Moorhouse, who was acting for the defendants except Stockton and Woods, wrote the letters above referred to, and that the defendants made a payment on account after they had not only all the information contained in Schrader's letter of December 23rd, but also after they had possession of both options. The making of payments after notice of the fraud is evidence of an election to affirm. Lawrence's Case, 2 Ch. App., 421. In addition there is Moorhouse's letter to Schrader of March 18th, which contains the significant phrase, "and then there is the agreement between the bunch of you and Stockton and Woods, which we are recognizing." No explanation was given of this sentence, and I can only take it to refer to the agreement between the plaintiffs and Woods and Stockton by which the plaintiffs were to pay them $4,000, which, Moorhouse says, "we are recognizing." I can place no other interpretation upon these words, coupled with the defendants' payment of $4,000, than that the defendants, being aware of both options and of the agreement to pay Stockton and Woods the sum of $4,000, decided to affirm the contract and pay the purchase-price. In 20 Hals. 748, the law is laid down as follows:—

"A fourth defence is that the representee has elected to affirm the contract. It follows from what has already been shewn that if, after discovery of the whole of the material facts giving him the right to avoid the contract, the representee has, by word or act, definitely elected to adhere to it, the representor has a complete defence to any proceedings for rescission. The acts and conduct relied on as evincing the representee's affirmance must be such as are more con-

sistent, on a reasonable view of them, with that than with any other theory."

Under the facts of this case as disclosed by the evidence, I am forced to the conclusion that the defendants, after being aware of the facts constituting the fraud, elected to affirm the contract. The defendants' claim for rescission, therefore, fails.

In their statement of claim the plaintiffs ask for payment of the balance of the instalment and in default thereof a sale of the land. In the alternative they ask that in default of payment the interests of the defendants in the land be foreclosed and possession delivered to the plaintiffs. I am of opinion that the plaintiffs are not entitled to personal judgment against the defendants on which execution could be issued. It is only where a defendant has accepted the title of the plaintiff, or in his contract has expressly agreed to pay irrespective of the plaintiff having title, that the court will decree payment without the plaintiff having first shewn a good title and thus satisfied the court that he is able to deliver the property if the defendant pays the purchase-money. Landes v. Kusch, 28 W. L. R. 915. The plaintiffs here have neither alleged in their pleadings nor proven at the trial that they have any title whatever to the land, neither are they entitled in my opinion to an order for sale. Had they claimed in their pleading that they were entitled to a vendor's lien, and asked for a declaration to that effect, they might have been entitled, upon the defendants not paying the amount due within the time fixed by the court, to an order for the sale of the land to satisfy their vendor's lien. No such claim, however, is made. The plaintiffs are entitled, however, to the relief asked for in their alternative claim, that is that a time be fixed within which the defendants must pay, and upon default the interest of the defendants in the land be foreclosed. While this relief is asked for as foreclosure, it is in reality asking for a cancellation of the contract in so far as the defendants' interest in the land is concerned. Lysaght v. Edwards, 2 Ch. D., at p. 506. The time to be allowed must in each case depend upon the circumstances of that particular case. In the present case, considering that over $21,000 has been paid, and the state of the money market, I will give the defendants

until July 1st next to pay. In default of payment on or before that day the plaintiffs will be entitled to an order declaring that the defendants' rights under the contract in so far as the land is concerned have ceased and are at an end. Hicks v. Laidlaw, 22 M. L. R. 96.

SASKATCHEWAN.

ELWOOD, J. DECEMBER 28TH, 1914.

CHAMBERS.

RE WATCHMAN.

Criminal Law—Receiving Stolen Goods—Code, sec. 399—Defective Conviction—No Allegation that Goods had Previously Been Stolen—Power to Amend—Depositions Must be Before Magistrate or Judge.

A conviction under sec. 399 of the Criminal Code for receiving stolen goods is bad if it does not contain an allegation that the goods had previously been stolen.

A magistrate, assuming that he has a right to amend a conviction, must, in order to make the said amendment, have before him evidence which would justify an amendment.

A judge has no power to amend a conviction under sec. 1124 of the Code, unless the depositions are before him.

An application for a writ of habeas corpus and for a writ of certiorari in aid thereof.

W. H. McEwen, for prisoner.

H. E. Sampson, for Attorney-General.

J. F. Bryant, for Canadian Pacific Railway Company.

ELWOOD, J.:—The prisoner was on the 3rd day of December, 1914, tried before William Trant, police magistrate, under an information charging the prisoner that he did on the 27th day of November, 1914, at Regina, in the province of Saskatchewan, unlawfully have in his possession thirty-three grain doors of the value of over $10, the property of the Canadian Pacific Railway Company, he, the said Watchman, then knowing the same to have been stolen, and on the same day was convicted by the said magistrate. The minute of conviction is as follows:

"I do convict the within-named accused of the offence charged and do order that he be imprisoned with hard labour for the term of three months. I do further order that he pay to the Canadian Pacific Railway Company the sum of $33 for damages, to be paid forthwith; in default of payment forthwith to be imprisoned for a further term of one month."

The formal conviction was on the same day made out in the terms of the above minute of conviction, and a warrant issued, which warrant omitted from it any reference to payment of the $33 or imprisonment in default thereof, and commanded the imprisonment for the three months above-mentioned. The objections which were urged bfore me were the following:

1. The conviction and complaint herein, the police magistrate's minute of adjudication, the conviction and the warrant of commitment herein state no offence known to the law.

2. The police magistrate had no jurisdiction to order the accused to pay the sum of $33 or any sum to the Canadian Pacific Railway Company as damages or at all.

4. The police magistrate had no jurisdiction to order that in default of payment by the accused of the sum of $33 to the Canadian Pacific Railway Company as damages the accused should be imprisoned for a further term of one month.

On the return of the motion before me, two amended convictions were filed, one convicting the accused for that he, on the 27th day of November, 1914, at Regina in the said province, did receive and have thirty-three grain doors of the value of over $10, the property of the Canadian Pacific Railway Company and theretofore stolen, he, the said Thomas Watchman, then well knowing the said grain doors to have been stolen, and adjudging the said Thomas Watchman to be imprisoned with hard labour for three months, and ordering the repayment of the sum of $33 as compensation without adjudging any penalty for failure to pay the $33. The other conviction convicted the accused in the terms of the second conviction, but merely adjudged him to be imprisoned with hard labour for three months, and made no reference to the payment of the $33. At the hearing counsel for the Attorney-General stated that he elected to rely on the third conviction instead of the second. It was stated to me by counsel that the evidence before the mag-

istrate was taken in shorthand, and that the reporter who took this evidence had gone to England, and he would not likely return till March; and as the evidence had not been extended there was therefore nothing before me to shew what evidence was before the magistrate when he made the conviction. Counsel for the informant and for the Attorney-General contended that the magistrate had the right to return an amended conviction, and that in any event I had the right to amend the conviction under sec. 1124 of the Criminal Code. So far as my powers are concerned, I am satisfied that before I can amend the conviction I must have before me the depositions, and I must be satisfied from a perusal of the depositions that the depositions justify the amendment. The objection to the conviction, apart from that which adjudges compensation and imprisonment in default thereof, is that neither the information nor the minute of conviction nor the original conviction states that the goods in question had been stolen. The conviction is apparently under sec. 399 of the code, at least that is the only section to which I was referred. While it is probable that in most cases, in order to prove the guilty knowledge, it would be necessary to prove the actual theft of the goods, yet, it is quite conceivable that it could be possible for one to have in his possession goods which he knew to have been stolen, and yet those goods, prior to their having reached him, may have lost the character of stolen goods. See Regina v. Schmidt, 35 L. J. Mag. Cas., 94. I notice, in looking at the forms of indictment for various offences contained in the code, that the form of indictment for receiving stolen goods does contain an allegation that the goods had theretofore been stolen. I am of the opinion, therefore, that the information, minute of conviction and conviction as originally drawn were bad in that they did not contain an allegation that the goods had theretofore been stolen.

So far as the amendment by the magistrate is concerned, the magistrate, assuming that he had the right to amend, would have to have before him evidence which would justify an amendment. See Paley on Convictions, 7th Ed., p. 234. In Rex v. Barker, 1 East, p. 183, Lord Kenyon, C.J., says:

"If the magistrate has done no more than return the conviction in a mere formal shape, instead of sending it up in the informal manner in which it was first drawn, and

supposing that the facts as they really happened would warrant him in the return he has now made, the contrary of which is not imputed, I am of the opinion that it was not only legal but laudable in him to do as he has done, and he would have done wrong if he had acted otherwise."

In the case at bar objection was made that the evidence was not before me, and it was, as I understand, suggested that the evidence would not warrant the conviction. I think, therefore, that a question having arisen as to the evidence, I would not be justified in accepting the amended conviction under the circumstances of this case in the absence of the depositions, nor have I power myself in the absence of the depositions to amend.

The result will be that the conviction and the warrant of commitment will be quashed; there will be no action against the magistrate.

Under all of the circumstances of this case I will not award any costs to either party.

Conviction quashed.

ALBERTA.

HARVEY, C.J. JANUARY 7TH, 1915.

TRIAL.

CANADIAN BANK OF COMMERCE v. McLEOD.

Promissory Note—Holder in Due Course—Consideration—Past Indebtedness—Future Advances—Set-off.

A gave to B. two promissory notes, dated June 26th, 1912, in payment for a horse purchased from B. B. endorsed the notes to C. on July 11th, 1912, as collateral security for his indebtedness, there being nothing then due and payable to C. from B. In October, 1911, B. had borrowed money from C. and gave the latter a general letter of hypothecation covering all securities which he might subsequently lodge with C. for his indebtedness from time to time. When the first of the said notes became due in October, 1913, A. notified C. that he had obtained a judgment against B. in respect of the transaction in which the notes were given. On July 23rd, 1912, a few weeks after A.'s notes came into C.'s possession, one of B.'s notes in favour of C. fell due, and the same thing happened every few days thereafter. On August 9th, 1912, a further advance was given by C. to B. and this also happened every few days thereafter. On each day when a note of B.'s

in favour of C. fell due it was paid either by another note or in some other manner, but before such payment was made there was a past indebtedness then payable from B. to C. In an action by C. on the two notes of A. endorsed by B. to C., A. contended that the amount of the said judgment against B. should be set-off against C.'s claim, on the ground that C. was not a holder in due course, having given no consideration for the notes since there was no debt payable by B. to C. at the time B. negotiated the notes to C.

***Held*, that the past indebtedness of B. constituted good consideration for the notes in question.**

***Held*, also, that the making of further advances constituted good consideration applying to all the securities held by C. at the time of making such advances.**

***Bank of Commerce* v. *Wait* (1908), 1 A. L. R. 68; *Bank of B. N. A.* v. *McComb* (1911), 21 M. R. 58: distinguished.**

Action on two promissory notes.

Michael Smith, for plaintiff.

Alex. Knox, for defendant.

HARVEY, C.J.:—The plaintiff's claim is on two promissory notes, each for $425 with interest at eight per cent. dated 26th June, 1912, given by the defendant to W. C. Kidd, Limited, Listowel, and endorsed to the plaintiff and payable one on the 1st day of October, 1913, and the other one year later.

The notes were delivered to the plaintiff on July 11th, 1912, as collateral security for the payee's indebtedness. At that time the payee's indebtedness was entirely covered by its promissory notes, there being nothing then due and payable. The notes sued on were given for the price of a horse purchased by defendant from Kidd, Ltd., in respect of which transaction defendant has obtained a judgment against Kidd, Ltd., for $600 damages and costs. The defendant contends that the amount of this judgment should be set off against the plaintiff's claim on the ground that the plaintiff is not a holder in due course having given no consideration for the note, there being no debt payable at the time the note was negotiated to it. He supports this contention by the authority of Bank of Commerce v. Wait (1908), 1 A. L. R. 68, and Bank of B. N. A. v. McComb (1911), 21 M. R. 58. It is not necessary for me to consider whether I would agree with the conclusions in those cases because the present case is quite clearly distinguishable from them.

In October, 1911, Kidd, Limited, borrowed money from plaintiff and a few days later gave plaintiff a general letter of hypothecation covering all securities which it might sub-

sequently lodge with plaintiff for its indebtedness from time to time. In pursuance of this letter securities were given from time to time and advances were made to Kidd, Limited, all apparently covered by direct notes until on 11th July, 1912, when the notes in question were given the indebtedness amounted to over $18,000 and the collaterals to about $38,000. This course of business continued until after the first note in question became due when for the first time defendant notified the plaintiff that he had a claim against Kidd Limited in respect of the transaction. On July 23, 1912, less than two weeks after the notes came into plaintiff's possession, one of the notes of Kidd, Limited, fell due and the same thing happened every few days thereafter. On August 9th a further advance was given by plaintiff to Kidd, Limited, and this also happened every few days thereafter and when the first note fell due in October, 1913, the indebtedness of Kidd, Limited, to plaintiff had increased to about $27,000.

The bank apparently preferred to keep the personal indebtedness of Kidd, Limited, covered by notes and it would appear that each day when a note fell due it was paid either by another note or in some other manner but before such payment was made there was a past indebtedness then payable which under the Bills of Exchange Act would be a good consideration even with the limitation which the cases cited place on the terms of the Act.

In the McComb case the judges are all careful to point out that before the note covering the principal debtor's debt fell due the bank had been notified of the infirmity of title of the debtor in respect of the note taken as collateral, being apparently of opinion that if such had not been the case there would have been consideration without notice of any defect.

Moreover, the making of further advances must undoubtedly have been a consideration which would apply to all the securities held by plaintiff at the time of making such advances. So that in both respects there was consideration given for the notes in question if not on the day plaintiff received them certainly from time to time thereafter long before plaintiff had any notice of any defect in the title of Kidd, Limited.

The plaintiff is, therefore, a holder in due course and entitled to recover the full amount from the defendant.

As plaintiff holds collaterals considerably in excess of the amount of the indebtedness of Kidd, Limited, and is at present realizing on them, no further advances being made, defendant's counsel asks that execution may be stayed until it appears whether plaintiff may not be able to satisfy its claim against Kidd, Limited, out of its other collateral.

It appears to me that this might work an injustice to the plaintiff and as Kidd, Limited, were horse dealers it is not impossible that there may be claims similar to defendant's in respect of some of the other collaterals. I think, however, the defendant is entitled to some protection and it appears to me that the most satisfactory way in which I can give it is to give him liberty to pay into court in this action the amount of the judgment recovered by him against Kidd, Limited, or any part of it if he cannot pay the whole. The amount paid into court will only be paid out—whether to plaintiff or defendant—on a judge's order and it will probably not be long before it can be ascertained with reasonable certainty whether plaintiff can realize sufficient on its other securities to pay the indebtness of Kidd, Limited, to it.

The plaintiff, of course, will be entitled to enforce payment from defendant of the amount of this judgment over and above what defendant pays into court. The judgment for plaintiff will be for the amount of the two notes with interest at 8 per cent. till maturity and 5 per cent. thereafter with costs.

ALBERTA.

HARVEY, C.J. JANUARY 5TH, 1915.

RURAL MUNICIPALITY OF McLEAN v. SOUTHERN ALBERTA LAND CO.

Assessment and Taxation—Crown Lands—"Occupant"—Rural Municipalities Act—Liability to Taxation.

The interest of a person in Crown lands may be taxed, though that interest be no more than that of a lessee.

A. E. Dunlop, for plaintiff.

J. C. Rand, for defendant.

HARVEY, C.J.:—The plaintiff's claim is for certain taxes assessed against the defendant as occupant of certain lands. The defendant is the purchaser from the Government of Canada of these and other lands by virtue of a certain agreement of purchase assigned to it and certain orders in council confirming the assignment and substituting certain other lands for part of the lands in the original agreement.

The agreement calls only for some three hundred and eighty thousand acres and it is admitted that there is available to satisfy the purchaser in the lands reserved over four hundred and twelve thousand acres.

It appears that when the substitution was made a certain area was set aside out of which the remainder to which the defendant is entitled is to be taken. The lands in question do not come within that area but are definitely specified in the order in council. No question is raised as to any of the said lands being unavailable and it would appear therefore that the defendant is entitled to become the owner of them upon compliance with the terms of the purchase agreement. The fact that the ownership when acquired is to be subject to certain conditions imposed by the Irrigation Act does not appear to me to affect the question at issue. It is well settled that the interest of a person in Crown lands may be taxed though that interest may be no more than that of a lessee. It is also perfectly clear by the terms of the Rural Municipalities Act that it is the intention to tax such interests and the defendant comes clearly within the definition of "Occupant" in the Act. I see no grounds therefore upon which it can escape liability and there will be judgment for the plaintiff for the amount claimed with costs.

ALBERTA.

McCARTHY, J. DECEMBER 31ST, 1914.

TRIAL.

TAMBLEN v. WESTCOTT.

Malicious Prosecution—Termination of Proceedings—Proof of—What Constitutes.

In an action for damages for malicious prosecution the plaintiff tendered as evidence of the termination of the proceedings the original information with the following words written immediately after the form of charge in the information: "Charge read, information withdrawn." This was signed by defendant.

***Held*, that this constituted sufficient evidence of the termination of the proceedings in favour of the accused, it not being absolutely necessary to prove the termination of proceedings by the formal record or certificate of acquittal.**

***Fancourt* v. *Heaven*, 18 O. L. R. 492; *Mortimer* v. *Fisher*, 11 D. L. R. 77; *Beemer* v. *Beemer*, 9 O. L. R. 69, applied.**

Action for damages for malicious prosecution.

J. Cormack, for plaintiff.

S. S. Dickson, for defendant.

McCARTHY, J.:—The action came on for trial before me at the sittings of the court held at Edmonton on the 13th doy of November, 1914. The evidence adduced by the plaintiff did, to my mind, prove malice and want of reasonable and probable cause on the part of the defendant. The plaintiff tendered as evidence of the termination of the proceedings the original information with the following words written immediately after the form of charge in the information. "Charge read, information withdrawn," signed "George Westcott." George Westcott is the defendant in this action.

It was contended by counsel for the defendant that this was not sufficient evidence of the termination of the proceedings.

The result of the more recent authorities is that the termination of the proceedings in favour of the accused may be proved by evidence other than the formal record or certificate of acquittal.

For a long time in the province of Ontario it was held to be the law that it was necessary to produce the record of the proceedings where the trial had been on an indictment and that before the record could be made up it was necessary to procure an order of the judge presiding at the criminal trial or the fiat of the Attorney-General before the Clerk of the Peace could make up the record. See Regina v. Ivy, 24 C. P. 78, and Hewitt v. Cane, 26 O. R. 133. These cases were in effect overruled by the decision in Attorney-General v. Scully, 4 O. L. R. 394. It was during the time when the stricter view of the law was adhered to that such cases as McCann v. Preveneau, 10 O. R. 573, was decided. But even during this time it had been held in Sinclair v. Hayes, 16 U. C. R. 247, where the charge had been before magistrates that it was unnecessary to shew any record or adjudication in writing.

At one time it was also held that the entry of a nolle prosequi was not a sufficient termination to found an action for malicious prosecution for the reason that a new charge might subsequently be laid (Goddard v. Smith, 6 Mod. 262). The contrary view was, however, held in Gilchrist v. Gardner, 12 N. S. W. L. R. 184, and it has been held in Saskatchewan that the direction of the Attorney-General to his agent not to prefer a charge after a committal for trial has been had is a sufficient termination (see Mortimer v. Fisher, 11 D. L. R. 77).

In Beemer v. Beemer, 9 O. L. R. 69, oral proof of an informal termination of the prosecution was admitted and held sufficient. Indeed in that case it was not at all clearly shewn how the proceeding had been in fact terminated.

The judgment of Anglin, J., in Baxter v. Gordon Ironsides & Fares Company, 13 O. L. R. 598, is not opposed to this view. In that case it was proved that the termination had been brought about by a compromise or arrangement between the parties and the magistrate had endorsed on the information "settled out of Court." The ground of the decision was that such a termination was not one in favour of the accused. Anglin, J., at p. 600, however, says: "It is conceded by the defendants that the abandonment of a prosecution by the complainant or the entry of a nolle prosequi by the representative of the Crown—if not the result of some compromise or arrangement with the accused—is a termination of the proceedings."

In Fancourt v. Heaven, 18 O. L. R. 492, it was held that the withdrawal of the charge in open court by the Crown Attorney was a sufficient termination.

On the reasoning in such cases as Fancourt v. Heaven, Mortimer v. Fisher and Beemer v. Beemer, I think, that, in the absence of proof that the withdrawal of the prosecution was brought about by a compromise or arrangement to which the accused was a party the termination in favour of the accused, i.e., the plaintiff has been shewn and as in my view there was a lack of reasonable and probable cause for the institution of the proceedings and malice or at least an improper motive. (See Wood v. Newby, 21 W. L. R. 438.) I give judgment for the plaintiff.

As to the question of damages, apparently the plaintiff was detained in custody for a very short time. He appeared at the office of the Chief of Police and was obliged to obtain bail on the Saturday evening in question and he appeared for his preliminary hearing on the following Monday when the charge was withdrawn.

I give judgment for the plaintiff for $250 damages and there will be costs to the plaintiff in accordance with column 2 of schedule "C" of the Rules as to costs without set off.

SASKATCHEWAN.

WOOD, DIST.CT.J. NOVEMBER 11TH, 1914.

DISTRICT COURT OF WEYBURN.

ARMSTRONG v. LARSEN.

Sale of Goods—Lien Note—Default in Payment—Retaking Possession of Goods — Compliance with secs. 7 & 8 of Sale of Goods Act—Onus of Proof.

Held, that the onus of proving compliance with secs. 7 and 8 of the Sale of Goods Act rests upon the plaintiff.

Sawyer-Massey, Ltd. v. *Bouchard* (Alta.), 13 W. L. R. 394, followed.

Massey-Harris v. *Elliott*, 11 D. L. R. 632, inapplicable.

Action for the balance due under a lien note.

James Graham, for plaintiff.

H. M. Allan, for defendant.

WOOD, DIST,CT.J.:—The lien note was upon a team of geldings. The amount of the note was $400. Upon default of payment of the note, plaintiff re-possessed the horses, and sold them, realizing therefor $45, for which credit was given on the note. The lien note expressly gave the holder the right to proceed for any balance after seizure and sale of the property. That question therefore does not arise in this action.

The only question to be decided in this action is whether or not the plaintiff complied with secs. 7 and 8 of the Sale of Goods Act in retaking possession and selling the property. In that connection I am only called upon to decide as to whether the onus of proving compliance with these provisions was on the plaintiff or on the defendant. I have no hesitation in saying that the onus was on the plaintiff. In Sawyer-Massey Ltd. v. Bouchard, 13 W. L. R. 394 (Alta.), Stewart, J., stated at p. 401 in referring to these particular provisions:—"In my opinion also the burden of proving that these provisions have been complied with lies on the vendors, the plaintiffs." Counsel for the plaintiff referred

me to Rules of Court 154 and 155. Neither of these references can be of any assistance to the plaintiff as they relate entirely to matters of pleading. Rule 154 is taken from the English Rule 210. The general effect of this rule is that under the existing rules of pleading, conditions precedent need not be pleaded by the plaintiff, a general averment of the due performance of all conditions precedent being implied in every pleading. If the defendant intends to rely on the non-performance of any condition precedent he must specifically allege in his defence what that condition was, and that it has not been performed. If he does not do this, due performance will be presumed.

In the Annual Practice 1913, p. 333, the following appears at the end of the first note to the English Rule:—"Nevertheless when a condition precedent is properly pleaded, the burden of proving its due performance, or the waiver of its due performance still rests on the plaintiff."

Massey-Harris v. Elliott, 11 D. L. R. 632, cited by counsel for the plaintiff has not, in my opinion, any application. In this case the plaintiff, I think, unnecessarily pleaded that he held the property for the statutory period of 20 days, but did not plead that he gave the necessary notice of sale. The defendant has specifically set up in his defence non-compliance with the statute. The plaintiff has not satisfied the onus which was upon him of proving compliance with the statute, and that being so, the contract is rescinded.

There will be judgment for the defendant, dismissing the plaintiff's action with costs, the lien note to be delivered up to the defendant for cancellation.

BRITISH COLUMBIA.

MORRISON, J. JANUARY 14TH, 1915.

TRIAL.

TIDY v. CUNNINGHAM.

Negligence—Liability for Act of Third Party—Defendant Having No Control Over — Absence of Knowledge on Part of Defendant—Gas Escaping from Fractured Pipe —"Nuisance."

The flowers in the plaintiff's flower store were injured by reason of the escape of gas from a pipe of defendant gas company. Unknown to the said company, the pipe had been fractured as a result of the operations of a steam roller belonging to a third party upon the road under which the pipe was laid:—

***Held*, that defendant company was not liable since the fracture was caused without its knowledge by a third party over whom it had no control, and the consequence of whose acts it could not reasonably have anticipated.**

***Richards* v. *Lothian*, [1913] A. C. 263, followed.**

J. P. Hampton Bole, for plaintiff.

W. J. Whiteside, K.C., for defendant.

MORRISON, J.:—The defendant, who owns or controls a gas works in the city of New Westminster, is duly authorised by that city to carry on those works and is empowered to lay pipes, etc., for the supply of gas to patrons. The pipes laid pursuant to these powers were properly laid, and the one in question was so laid within a comparatively recent period and, at the time material to this matter, was in good, sound condition. Through no negligence on defendant's part, this pipe sustained a clean fracture and, in consequence, gas escaped, which found its way to the surface of the street under which the pipe is laid and into the flower shop of the plaintiff, whereby he claims he sustained the damage complained of. Just about the time plaintiff discovered gas in and about his premises, the street in question was being repaired or altered or improved by a contracting company for the corporation of the city of New Westminster and had utilised a heavy steam roller in the performance of their work. In carrying on the work in question, it seems the

surface of the street had been taken away either wholly or partially and new material laid down and at certain stages the steam roller was used over the locus in quo. After complaint by the plaintiff to the defendant, both parties drew the city council's attention to the fact that gas was escaping, and, after some considerable time, the street was opened up, when the fracture was discovered. I find that the fracture was caused without the knowledge of the defendant by a third party over whom the defendant had no control and the consequence of whose act the defendant could not reasonably have anticipated. Nichols v. Marstand, 2 Ex. D. 1, Bramwell, B., and Box v. Jubb (1879), 4 Ex. D. 76, Kelly, B., both quoted by Lord Moulton in delivering the judgment of the Privy Council in Richards v. Lothian, [1913] A. C. 263, at p. 278-9. Their Lordships agree with the law as laid down in the judgments above cited and are of opinion that a defendant is not liable on the principle of Fletcher v. Rylands, L. R. 1 Ex. 265, L. R. 3 H. L. 330, for damages caused by the wrongful act of third parties.

I find there was no negligence on defendant's part, and, if there was a nuisance, it was not caused by the defendant. I think that "nuisance," as applied to this case, may be taken in the restricted sense referred to by Lord Sumner in the recent case of Charing Cross, &c. Electricity v. London Hydraulic Power Co., 83 L. J. K. B. (C.A.) at p. 1914.

The present case, I venture to say, is stronger than the illustration there put, inasmuch as there is no act of the defendant jointly operating to cause the break in the pipe. The above case, as regards the question of nuisance, turns on the fact that the nuisance was caused by the defendant.

The action is dismissed.

SASKATCHEWAN.

ELWOOD, J. DECEMBER 20TH, 1914.

CHAMBERS.

CANADIAN BANK OF COMMERCE v. HARVEY.

Practice—Final Judgment—When to be Entered Upon Admissions—Examination for Discovery—Admissions Must be Clear and Unequivocal—Must be no Serious Question of Law—Acceptance of Defence Raised by Pleadings Not Shewn to be False by Admissions.

The court will not allow final judgment to be signed upon admissions made in an examination for discovery unless the admissions are clear and unequivocal, nor will the court allow final judgment to be entered where there is any serious question of law to be argued.

***Gilbert* v. *Smith*, 2 Ch. D. 686, at p. 689, 45 L. J. Ch. 514, referred to.**

If the plaintiff wishes judgment on admissions, he must accept as true the various defences to the action raised by his pleadings, and which are not shewn to be false by his admissions.

***Ross* v. *McBride*, 3 W. L. R. 561; *United Telegraph Co.* v. *Donohue*, 31 Ch. D. 399, 56 L. J. Ch. 480; *Barry* v. *Toronto & Niagara Power Co.*, 11 O. L. R. 48, followed.**

An appeal from the Local Master at Weyburn, who refused an application of the plaintiff for judgment on admissions made in his examination for discovery.

P. H. Gordon, for plaintiff.

G. S. Kennedy, for defendant.

ELWOOD, J.:—This is an appeal from the Local Master at Weyburn, who refused an application of the plaintiff for judgment on admissions in his examination for discovery. The action is on a promissory note made by the defendant in favour of the plaintiff. The defendant raises a number of defences to the action, and among them one that the promissory note sued on comprises in part a sum which represents interest at a rate in excess of that which the plaintiff is entitled to take or receive under the Bank Act, and further that since the year 1906 the defendant has been a customer of the plaintiff, and in the course of the said periods the defendant was at various times indebted to the plaintiff, and the plaintiff in renewing said indebtedness from time to time

has stipulated for, taken and reserved, exacted, and received or recovered interest at a rate in excess of that allowed by the Bank Act, and for all of the above the defendant claims credit for the sum of $1,000. The defendant repeats the various allegations contained in the statement of defence and counterclaims for the sum of $1,000.

From the examination for discovery it would appear that the note sued on was given for the sum of $12,242.65, payable one month after June 30th, 1914, and was a renewal of a former note for $12,063.05, and it was claimed that the result of the examination shews that the only sum in dispute between the parties with reference to that note is the sum of $102.65, which is claimed to be the sum retained by the plaintiff from the note sued on by way of discount. I do not think it is altogether clear from the examination that that is the clear result to be arrived at. The plaintiff claims to be entitled to judgment for the balance of the note over and above the above sum in dispute, and to be entitled to proceed with the trial of the action for the amount in dispute. A considerable argument was had before me as to the effect of sec. 91 of the Bank Act, and a number of cases were cited before me as to what the effect of the law is under that section. In view of the conclusion I have come to, it is unnecessary tnat I should express any decided opinion as to the effect of the Act. I am of the opinion that the appeal should be dismissed for the following reasons. The court will not allow final judgment to be signed upon the admissions in the pleadings unless the admissions are clear and unequivocal. Annual Practice (1915), p. 559, and cases therein cited. The admissions herein are not by any means clear. Nor will judgment be allowed to be signed where there is any serious question of law to be argued. Gilbert v. Smith, 2 Ch. D. 686 at p. 689, 45 L. J. Ch. 514. There does appear to me to be a very serious question of law to argue, which affects in any event part of the claim: in fact, most of the argument before me was upon the question of law as to the effect of the Bank Act. In such a case the proper procedure would be to apply under order 25, Rule 2, if the point of law is properly raised by the pleadings and if not, at the trial. See Annual Practice (1915), p. 560. I am of the opinion also, that if the plaintiff wishes judgment on the admissions, he must accept as true the various defences to the action raised by his pleadings and which

are not shewn to be false by his admissions. The effect of this would be that the plaintiff could only sign judgment for the amount of the claim which is clearly owing, and would not be at liberty to proceed against the defendant for the amount in dispute. This view of the law was taken by Wetmore, J., in Ross v. McBride, 3 W. L. R. 561, which case follows the case of United Telephone Co. v. Donohoe, 31 Ch. D. 399, 55 L. J. Ch. 480, and the judgment of Anglin, J., in Barry v. Toronto & Niagara Power Co., 11 O. L. R. 48.

The result will be that this application will be dismissed with costs, to be paid by the plaintiff to the defendant in any even of the action.

Application dismissed.

ALBERTA.

FEBRUARY 3RD, 1915.

SUPREME COURT—APPELLATE DIVISION.

HACKETT v. CITY OF EDMONTON.

Master and Servant—Servants of the City of Edmonton—Employed During Pleasure of Council—Notice of Dismissal Unnecessary—Edmonton Charter.

Held, that a servant of the city of Edmonton who is not employed under a by-law is not, by virtue of a provision of the Edmonton Charter, entitled to any notice of dismissal or to any damages for the failure to give such notice, and it is immaterial whether or not the servant was employed before or after the enactment of the said provision.

Lawler v. *City of Edmonton*, 29 W. L. R. 661, followed.

An application to quash an order made by the police magistrate for the city of Edmonton requiring the said city to pay $122 for wages.

The application was heard by HARVEY, C.J., BECK, and STUART, JJ.

C. T. Chowne, for plaintiff, respondent.

H. C. Boyd, for defendants, appellants.

The judgment of the court was delivered by

HARVEY, C.J.:—The complainant was dismissed without notice on the ground that the city was reducing expenses. He was paid all wages due and though the order declares that the sum adjudged is for wages it was claimed as a sum that would have been earned up to the end of the month during which he was dismissed and for one month additional.

While it is apparent that there might be other objections to the order, the case is governed by Lawler v. City of Edmonton decided by this court last October (29 W. L. R. 661.) It was held in that case that by virtue of the statutory provision in the charter of the city of Edmonton an employee not employed under a by-law is not entitled to any notice or to any damages for failure of such notice.

It was contended that in this case the employee was engaged by the city before the enactment of the said statutory provision and that it does not apply to him.

The provision is, "Unless it shall be otherwise provided by special by-law appointing them every officer, official, servant or employee of the corporation shall hold his office or employment at the pleasure of the council or at the pleasure of the commissioners or such departmental head as the council may by general or special by-law provide."

There is no suggestion that the complainant was other than an ordinary employee there being no special time of employment and there consequently seems no justification for considering that the statutory provision does not apply to him. It says "every employee" not "every employee hereafter appointed," and there is no justification for concluding that it means other than it says. The order will go quashing the order of the police magistrate. The city will have the costs of the application.

ALBERTA.

FEBRUARY 19TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

KERLEY v. CITY OF EDMONTON.

Damages—Assessment—Personal Injuries Caused by Negligence—Appeal from Finding of Trial Judge—Finding Not to be Disturbed Unless Conclusions of Judge Clearly Erroneous.

The assessment of the *quantum* of damages, either special or general, by a judge or jury should not be disturbed unless it is shewn that the conclusions at which the judge or jury arrived upon the evidence are clearly erroneous.

An appeal by plaintiffs from the judgment of Hyndman, J., in their favour, upon a question of the quantum of damages in an action for damages for injuries sustained through the negligence of defendant.

The appeal was heard by HARVEY, C.J., SCOTT, STUART, and BECK, JJ.

Frank Ford, K.C., for plaintiff, appellant.

J. C. F. Bown, K.C., for defendant, respondent.

HARVEY, C.J.:—The plaintiffs are husband and wife and their claim is for damages for injuries sustained by the wife in a street car accident caused by the negligence of the defendant's servants.

The action was tried by my brother Hyndman, who gave judgment in favour of the plaintiffs for $2,045, being $1,045 for special and $1,000 for general damages.

The appeal is a somewhat unusual one being by the plaintiffs who secured the judgment who ask that the amount be increased.

Mayne on Damages (8th Ed.), at p. 689, states: "It has been frequently decided that where the action is for unliquidated damages, the general (though not inexorable) rule is that the court will not grant a new trial on account of their being too low unless there has been some mistake in a

point of law on the part of the judge who presided, or in the calculation of figures by the jury; or unless it appears that the jury must have omitted to take into consideration some of the elements of damage."

New trials have been ordered however on the ground of inadequacy of damages allowed by a jury, e.g. Phillips v. L. & S. W. Ry. Co., 5 Q. B. D. 78, Church v. Ottawa, 25 O. R. 298 (affirmed on appeal to Court of Appeal), though no case has been brought to my attention of a case where the damages had been assessed by a judge but I am prepared to assume that the rule is the same in the case of a judge as of a jury. From the rule however it is apparent that the appellant must shew not that the amount of damages is not such as we might have awarded but that there has been some mistake on the part of the trial judge in reaching the conclusion he has. The particulars of special damage are set out in the statement of claim and amount to $3,530.85 of which nearly $2,000 purports to be actual out of pocket expenses.

Some weeks after the injury Mrs. Kerley went to Montreal accompanied by her son and a nurse. Her husband followed her later. The expenses connected with these trips, also board, nurses and doctors' bills in Montreal are included as part of the special damage. The chief item which does not represent a payment is one of $1,500 which is claimed for loss of time by Mr. Kerley in attendance upon his wife in Edmonton and Montreal. The evidence shews that the amount is an estimate of the loss of profit in his business which he sold shortly before his wife went to Montreal, which profit he considered he would have made if he had kept the business and remained in Edmonton. In addition to this there is over $1,000 claimed which is directly attributable to the Montreal trip and if the trial judge was of opinion that the plaintiffs were not justified in making this trip at the expense of the defendants and deducted the whole amount it would reduce the amount of special damages to less than the sum which he allowed.

The plaintiffs claim that these expenses are properly allowable because the trip was advised by the physician. The evidence hardly bears this out. The doctor in attendance says that Mrs. Kerley was living at home with her family, that she was not strong enough to look after the house and that she was in consequence suffering some mental worry

and he wanted to get her away from it and asked her where she would like to go and she said Montreal. Now it is quite apparent that that does not mean that he advised her to go to Montreal for it is clear that something much less expensive would have answered his purpose.

She would be entitled to some change which would entail some expense but it need not be anything like as great as a trip to Montreal and need not involve the sacrifice by Mr. Kerley of his business, the claim in respect of which seems rather remote in any event.

Then the items in respect of expenses in Edmonton are chiefly for services of doctors, nurses and attendants in respect of most of which there is no evidence as to their reasonableness. As to the doctors' charges they are for services before the trip to Montreal and after the return and for services "preparing for these professional examinations" using his own words, which mean apparently something connected with the trial. It is by no means clear that Mrs. Kerley's condition after the Montreal visit was properly attributable to the accident. When she left, the doctor who attended her in Edmonton was away so, for some time at least she was not under the doctor's care. Mr. Kerley says that after she arrived in Montreal she became ill and required a doctor and that for at least a month "he was there off and on practically every second day." This doctor's bill is put in at $200. There is no evidence explaining the cause of this illness which may have been something entirely apart from the injuries resulting from the accident. Then assuming that the doctor's attendance was not "off" at all we would have 15 visits proved for which a claim is made for $200.

The evidence thus leaves much to be desired as to establishing the reasonableness of this bill even if any of it is allowable. The same, though in a less degree, is the case with the nurses' and assistants' expenses.

It is quite apparent therefore that much latitude must be left to one who has to determine just what proper allowance should be made.

We do not know what the calculation of the trial judge was to reach the amount he arrived at and we cannot therefore say that he made any mistake in his calculation. In the case of McHugh v. Union Bank (1910), 3 A. L. R. 77, this court set aside the judgment of the trial judge because it could not find how the amount of damages was arrived at

in a case in which the amount could be determined partly by calculation as in such a case as this; but the Judicial Committee of the Privy Council, ([1913] A. C. 299), restored the trial judgment. At p. 309 the following expressions are used: "The assessment of the damages suffered by the plaintiff from such a cause of action is often far from easy. The tribunal which has the duty of making such assessment. whether it be judge or jury has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give." From the facts to which I have referred it is far from clear to my mind that the amount allowed by the trial judge was erroneous and therefore it should not be interfered with by this court.

The principle just enunciated applies with equal if not greater force to the assessment of general damages.

It is argued that the male plaintiff was entitled to some damages for the deprivation of the society of his wife and that the reasons given by the trial judge shew that his allowance was limited to the wife's loss. A complete answer to this seems to exist in the fact that no claim whatever is made in the statement of claim for any such damages. Objection is also taken to the fact that the trial judge exercised his own judgment on the question of the permanent character and extent of the physical and mental injuries formed from his observation of her in the witness box in preference to accepting the evidence of the medical witnesses.

The evidence of the doctors on this point is naturally opinion evidence and in this case they do not speak with the confidence one finds in some cases though that is perhaps a reason why greater value should be attached to their opinion. The trial judge, however, had the opportunity of observing Mrs. Kerley as a witness and if he could not take advantage of the benefit gained by that fact it is somewhat difficult to see the force of what is said in the above quotation from the judgment in the McHugh case. There is no other ground as far as I can see on which it can be said that his judgment in this respect is erroneous.

I am of opinion therefore that the appeal should be dismissed with costs.

SCOTT, STUART, and BECK, JJ., concurred.

Appeal dismissed.

ALBERTA.

FEBRUARY 19TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

SCHEUERMAN v. SCHEUERMAN.

Fraudulent Conveyance—Land Purchased by Husband and Conveyed to Wife—Intent to Defraud Creditors—Ineffectiveness—Land Exempt from Seizure Under Execution—Exemptions Ordinance—Action by Husband to Recover Proceeds of a Sale.

The plaintiff, with intent to defraud his creditors, conveyed certain lands to his wife. Plaintiff brought an action against his wife to recover from her the proceeds of the sale of the land. It was contended on behalf of the husband that he ought to recover since the lands, being exempt from seizure under execution by virtue of the Exemptions Ordinance, could not have been available for creditors.

Held, that the husband could recover on the ground that a conveyance of property not exigible under any form of execution, even though transferred with a fraudulent intent, could not be a fraud upon creditors.

Held, also, that, if the property was exempt from seizure under execution at the time of the making of the conveyance, it made no difference that thereafter it had ceased to be exempt.

Per HARVEY, C.J., and WALSH, J. (dissenting):—The evidence establishes that the husband ceased to occupy the house, and that its value became greater than $1,500 after the conveyance was made and, therefore, the property having ceased to be exempt from seizure under the Exemptions Ordinance was available for creditors.

2. That the husband could not recover on the ground that, having violated the law, he should not be allowed to resort to the law for protection, it being immaterial whether or not any creditor had been defeated or delayed so long as the conveyance was made with *intent* to defraud.

Judgment SCOTT, J., 29 W. L. R. 246, affirmed.

The appeal was heard by HARVEY, C.J., WALSH, STUART, and BECK, JJ.

O. M. Biggar, K.C., for plaintiff, respondent.

Frank Ford, K.C., for defendant, appellant.

STUART, J.:—In my opinion this appeal should be dismissed.

I cannot find any sufficient ground for interfering with the findings of fact which were made by the learned trial judge.

The property in question was purchased by the plaintiff and an agreement of purchase was taken in his own name. It was found by the trial judge that the money paid for the property belonged to the plaintiff. Then the plaintiff directed the vendor to issue a transfer to his wife the defendant which was done. It was admitted by both plaintiff and defendant that the property was put in the wife's name in order to protect it against the plaintiff's creditors, and that there was an express understanding between them upon this point.

The first defence raised is based upon the Statute of Frauds. But it seems to be now settled law that, where property purchased with the money of one person is conveyed to another, the case is within the saving section of the statute even though there be a clearly spoken verbal agreement that the grantee shall hold in trust for the person paying the money. Lewin on Trusts, 11th Ed., p. 54. Rochefoucauld v. Beustead, [1897] 1 Ch. 196. This distinction has generally been held to be a very serious whittling away of the terms of the statute but I would venture to suggest that the actual result is perhaps to confine the statute to cases where the transaction has absolutely nothing else in it than a declaration or creation of a trust, that is where a person already an owner, in fee or otherwise, declares or creates a trust; and to exclude from the operation of the statute the case where the agreement is made before the person undertaking to be a trustee has acquired any title to the property which he is to hold in trust. That is something more than a mere declaration or creation of a trust.

It was further contended that the plaintiff could not succeed in a court of equity upon an equitable claim when it was revealed that his act in having the property conveyed to his wife was due to a desire to defeat or delay his creditors.

This argument presents the real difficulty in the case. It was admitted that at the time of the transfer to the wife the property was the homestead of the plaintiff, being a house

and lot or lots in Edmonton in which the plaintiff and defendant were residing and which at the time did not exceed $1,500 in value. At the time of the conveyance, therefore, the property was exempt from seizure under the Exemptions Ordinance.

It seems to be very clearly established that a conveyance of property not exigible under any form of execution is not within the Statute of Elizabeth and is not a fraud upon creditors. Meunier v. Doray, 6 Terr. L. R. 194. May, Fraudulent Conveyances Am. Ed., p. 18. Sims v. Thomas, 12 A. & E. 536. It is therefore the case that the plaintiff never committed any fraudulent act. He could not defraud creditors by parting with property which the creditors could not attack.

But it is said that this makes no difference because he at any rate had the intention of defeating his creditors and having had such an intention in his mind when he quite lawfully conveyed the property to his wife in trust for himself he cannot come into a court of equity and ask to enforce the trust. Upon consideration I think this argument ought to be rejected. I know of no law which takes notice of a man's mere thought or intention where that thought or intention does not qualify and give some illegal characteristic to some outward act. In the present case the outward act was clearly legal.

It is impossible to apply the rule in pari delicto potior est conditio possidentis, where there has been in fact no delictum at all. Nor do I think the court is justified in amending the time-honored maxim that he who comes into equity must come with clean hands so as to make it read that he must come with a clean heart. If a man's hands are clean then I think the court is going beyond its functions in enquiring or noticing the condition of his heart. If he has neither done nor attempted anything illegal we have I think no right to examine his mind. No case has been cited and I think none can be found in which the maxim has been pushed to the extreme to which it is here attempted. The attempt simply amounts to asking the court to refuse to give a man his rights arising out of a certain transaction merely because he thought he was doing something wrong in entering into it when in fact he was not doing anything wrong. I have no reason to question the soundness of the reasoning of Chancellor Boyd in Mundel v. Tinkie, 6 O. R. 625, but clearly

the act there in question was fraudulent and illegal. There is a quite obvious distinction between a failure to effectuate the object and purpose of an illegal act and an omission to commit any illegal act at all.

The view I present was, I find, adopted by a very eminent judge, Mr. Justice Osler, in Day v. Day, 17 O. A. R. 157, and was not unfavorably looked upon by the other judges in that case.

I only need to add that we cannot, I think, take notice of a future possible increase in the value of the property. The character of the plaintiff's act must be decided upon the facts as they existed at the time it was committed. At that time it was a perfectly legal and not a fraudulent act and I am unable to see how the possible contingency of a future rise in the value of the property over $1,500 can be said to qualify the character of the act in any degree.

For these reasons I think the appeal should be dismissed with costs.

BECK, J.:—This is an appeal from the judgment of Scott, J., at the trial without a jury.

The plaintiff is the husband of the defendant. He held under an agreement for sale to himself and was living with his wife and family in a dwelling house in Edmonton of a value not exceeding $1,500. This property was consequently exempt from seizure under execution by virtue of the Exemptions Ordinance, i.e., was not exigible for the claims of creditors.

On paying the balance of the purchase money he requested his vendor to make the transfer to the defendant and this was done. It is admitted both by the plaintiff and the defendant that the transfer was made to the wife because the plaintiff was indebted to the J. I. Case Threshing Machine Company for the balance of the price of a threshing machine bought by the plaintiff and his wife's father and brother. He had given a mortgage to the Case Company for the entire purchase price on a farm he then owned —a "second homestead." The Case Company subsequently realized their claim by enforcing the mortgage. At the time the transfer of the Edmonton property was given to the defendant the plaintiff had no other property, except the "equity" in the land mortgaged to the Case Company. The plaintiff says that at the time of the transfer, the defendant

expressly promised to recover the Edmonton property to him. She denies this.

Assuming that the law is that, as a general rule, a debtor, who conveys land with the intent to defeat, hinder or delay his creditors, cannot have the assistance of the court for the purpose of recovering the property even where in the result no creditor is in fact ultimately defeated—a proposition with regard to which there are decisions both pro and contra—I think that the rule, if it exists, does not apply to the present case inasmuch as the property conveyed to the wife was not exigible for creditors for the reason that it was exempt.

Under these circumstances the Act of the plaintiff was a lawful act, not per se tainted with immorality or illegality and I think that under these circumstances the intent was immaterial and cannot attach to or qualify the lawful act so as to make it unlawful. This seems to be the ground of decision in Meunier v. Doray, 6 Terr. L. R. 194.

The evidence makes it perfectly clear to me that it was not the intention either of the plaintiff or the defendant that the conveyance to the defendant was by way of absolute gift to her and the trial judge has so found. If as a rule there is a presumption of law or an inference of fact that a conveyance by a husband to a wife is an absolute gift, I think no such presumption or inference is to be drawn under the circumstances of this case where the husband had no other property whatever and the property conveyed was the home of himself and his wife and family and obviously intended to remain their common home. I think that in the absence of any evidence of the conditions of the conveyance, the proper inference to be drawn would be that the property would continue to be the common home of the family.

In view of what has occurred between the plaintiff and the defendant here; the wife selling the property, receiving $2,000 of the purchase money, leaving a balance of $1,500 unpaid which is all that can now be made available for the husband whom she has abandoned, the circumstances seem now to be such as bring about a fairly equitable solution of their rights.

I would dismiss the appeal with costs.

HARVEY, C.J. (dissenting):—I think this appeal should be allowed.

I agree with the learned Chancellor of Ontario when he said in giving his reasons for judgment in Mundell v. Tinkis (1884), 6 O. R. 625, at 627, "I have always understood the rule of equity to be as expressed by Esten, V.C., in Phelan v. Fraser, 6 Gr. 336, that this court never assists a person who has placed his property in the name of another in order to defraud his creditor," and again on p. 629 when referring to the argument that the rule should not apply if the fraudulent intention has not been carried out he says: "If it is meant that the illegal purpose is not carried out unless it is proved that some creditor has actually been defeated or delayed, this is imposing an unsatisfactory test, because the act and conduct of the grantor are not affected by the subsequent course of third parties. So far as he is concerned the illegal purpose is complete; he has violated the law and should not be allowed to resort to the law for protection."

The learned trial judge relies on Taylor v. Bowers, 1 Q. B. D. approving Symes v. Hughes, L. R. 9 Eq. 476, followed in Mulligan v. Hubbard, 5 M. R. 225, but as I pointed out in Bakewell v. MacKenzie, [1905] 1 W. L. R. 68, the authority of Taylor v. Bowers has been very much weakened if not entirely destroyed by Kearley v. Thomson (1890), 24 Q. B. D. 742.

Rosenberger v. Thomas (1852), 3 Gr. 635, was a case where the plaintiff having been sued by a person on what he considered an unjust claim transferred his property to the defendant to protect it from the judgment if obtained. The court consisting of Chancellor Blake and Vice-Chancellors Esten and Spragge refused to give any assistance in recovering back the property. The Chancellor (p. 638) quotes with approval the words of Lord Eldon in Curtis v. Percy, 6 Ves. 739. "The moment the purpose to defeat the policy of the law, by fraudulently concealing that this was his property, is admitted, it is very clear that he ought not to be heard in this court to say that it is his property."

All the quotations I have given indicate that the intention is the question of importance but Osler, J., in Day v. Day (1889), 17 O. A. R. comes out plainly and says that though the intent is proved yet unless some creditor has actually been defrauded the plaintiff is to be permitted to have the court's assistance. The trial judge had decided the other way and no one of the other appeal judges adopted the views of Osler, J.-

If it is on grounds of public policy as I take it to be that the court refuses to assist a person out of the consequences of an illegal or immoral act, I find it difficult to understand why the purpose and intent of the act done rather than its fortuitious consequences should not be the matter of chief consideration and I feel satisfied that the great weight of authority is against the view expressed by Osler, J.

It is contended, however, that in this case the property in question was exempt from seizure and that consequently there was no possibility of creditors being prejudiced and that therefore there could be nothing fraudulent or wrong in the plaintiff putting the property in the defendant's name even though he did it for the purpose of defeating creditors. I find myself unable to agree with this statement of fact. The exemption is not an absolute but a conditional one only. The provision of the ordinance is: "The house and buildings occupied by the execution debtor and also the lot or lots on which the same are situate according to the registered plan of the same to the extent of fifteen hundred dollars."

Now it is apparent that occupation by the debtor is a condition of the exemption and also that the exemption is limited to a value of fifteen hundred dollars, any value in excess of that being available for creditors. The evidence establishes that the debtor ceased to occupy the house and that its value did become greater than fifteen hundred dollars because it was sold for three thousand five hundred dollars. It is clear, therefore, that if this property had been in the name of the debtor instead of being in that of his wife there would have been something to which execution could attach and that therefore creditors might have been prejudiced by his putting it in his wife's name.

Meunier v. Doray, 6 T. L. R. 194, was a quite different case. The action was by a creditor of the husband. The property was a country homestead which was exempt regardless of its value. It had always been occupied by the debtor and his family. Consequently at the time the action was brought the creditor would have had no right of access to the property even if it had stood in the name of the debtor. The action was tried before me and I found that value had been given by the wife for the property but on appeal the members of the court other than Mr. Justice Scott, who thought the appeal should be dismissed upon that finding,

expressed the opinion that even if that were not so the creditor had not shewn that he had been injured.

It seems quite settled that a voluntary conveyance made by a person about to enter on a hazardous business may be set aside at the instance of subsequent creditors.

In ex parte Russell (1882), 19 Ch. D. 588, Lord Jessel said: "A man is not entitled to go into a hazardous business and immediately before doing so to settle all his property voluntarily, the object being this: 'If I succeed in business I make a fortune for myself. If I fail I leave my creditors unpaid. They will bear the loss.' This is the very thing the Statute of Elizabeth was meant to prevent."

It appears to me unreasonable that in an action by a person who had conveyed his property under such conditions to protect it from possible creditors, against the person to whom he had conveyed it, the Court should require that its action be determined by the plaintiff's success or failure in business. To act on such a principle would not in my opinion be conducive to good morals.

The evidence in this case does not satisfy me that the creditor was not in fact delayed though it seems that at some time before the trial the claim had been paid though how or when does not appear. For the reasons I have stated however I am of opinion that that is not of importance. He might have been prejudiced and the intention was to defraud him. The plaintiff I think cannot be said to have clean hands and the court therefore should not assist him.

WALSH, J., concurred with HARVEY, C.J.

Appeal dismissed.

THE

Western Law Reporter

VOL. XXX. TORONTO, MARCH 8, 1915. No. 11

MANITOBA.

GALT, J. JANUARY 19TH, 1915.

HAIGHT v. DAVIES.

Manitoba Moratorium Act—Sale of Land—Crop Payments —Judgment for Payment—Final Order of Foreclosure.

By agreement in writing the defendant agreed to purchase land from the plaintiff, the purchase money with interest thereon to be paid in instalments on the 1st of December in each year by the proceeds of one half of the wheat crop in each year. The agreement contained the usual acceleration clause. The plaintiff obtained judgment for foreclosure with a reference and the Master's report was made and filed on the 1st of October, 1914, fixing the 2nd of January, 1915, as the date for redemption.

On motion for final order, it was *held*, that the agreement came within the spirit if not the literal reading of section 4(b) of the Manitoba Moratorium Act as being one for the "handing over of a share of the crops" and that the plaintiff was therefore entitled to judgment for immediate payment of his principal, interest, and costs, but that section 3 of the Act applied and postponed the redemption date one year so that a final order of foreclosure could not be made.

Motion for final order of foreclosure.

A. W. Bowen, for the plaintiff.

GALT, J.:—In this case, heard before me at Morden, the plaintiff sues under an agreement of sale dated December 1st, 1908, wherein the defendant purchased certain lands for the price of $2,500, and the agreement of sale provided that the purchase money should be paid as follows:—"The proceeds of one half of the whole of the wheat crop grown on the demised premises in each and every year until the full purchase price, together with interest thereon, is fully paid; the first payment of principal to become due and be paid on the

1st day of December, 1910, together with interest at 7 per cent. per annum from date thereof to be paid on the said sum or so much thereof as shall from time to time remain unpaid, whether before or after the same becomes due, and such interest to be paid yearly on the 1st day of December until the whole of the moneys payable hereunder are fully paid." The said agreement also contained the usual acceleration clause. The statement of claim shews that only two payments have been made by the defendant, namely, one on February 28th, 1912, $505.95, and one on December 16th, 1912, $140. Judgment was obtained by the plaintiff on May 26th, 1914, with a reference to the Master. The Master's report was made and filed on October 1st, 1914, fixing the time for redemption on January 2nd, 1915. The present motion is for a final order of foreclosure.

The question is to what extent, if any, the Moratorium Act applies to this case. Mr. Bowen, on behalf of the plaintiff, relies upon sec. 4 (b) of the Act as removing any difficulties in the plaintiff's way. The sub-section reads: "Nothing under this section shall be construed so as to interfere with any rights of a vendor or a mortgagee to enforce any agreement of a purchaser or mortgagor in any such instrument to hand over a share or shares of the crops on any such land to be applied in reduction or satisfaction of the moneys, whether principal, interest or otherwise, secured by any such instrument."

The agreement in question provides, not for the handing over of any share or shares of the crop but for handing over the proceeds thereof. On the other hand, it is impossible to apply any portion of the crop from time to time in payment of principal or interest unless the value of the grain be first ascertained.

I think the meaning of this peculiar sub-section will be best arrived at by construing it in accordance with the spirit rather than the letter of it. I accordingly hold that sec. 4 of the Moratorium Act does not affect the plaintiff's rights. But sec. 3 of the Act contains the following provision applicable to the circumstances of this case "and in all pending actions for such redemption, foreclosure, or sale, in which the time fixed for redemption is after July 31st, 1914, the same is hereby extended for one year from the date so fixed for redemption, and no final order for foreclosure or sale shall

be made in any such action until after the lapse of such extended period."

The plaintiff is entitled to immediate payment of his principal, interest, and costs, but no final order or foreclosure, nor for removal of caveat, can be made until after the lapse of a year from January 2nd, 1915.

MANITOBA.

MACDONALD, J. JANUARY 16TH, 1915.

TRIAL.

MAPLE LEAF MILLING CO. LTD. v. COLONIAL ASSURANCE CO.

Insurance — Fire Insurance — Foreigner Assuming English Name—Statutory Conditions—Policy Issued in Manitoba on Goods in Ontario—Incendiarism—Evidence—Fraud —Proofs of Loss.

Where a foreigner had for years carried on business in Canada under an assumed English name, insurance taken out by him in that name was *held* to be valid notwithstanding the contention of the insurers that they had thus been misled as to his nationality and would not have accepted the application had they known what the nationality was.

If incendiarism is alleged and payment resisted on that ground, it is necessary to adduce such evidence as would justify a conviction on a criminal charge for the same offence; mere suspicions, even though weighty, are not enough.

A policy issued in Manitoba upon goods in Ontario had printed upon it the Manitoba statutory conditions:—

Held, that these conditions being expressly limited by the Manitoba Insurance Act to insurance of property in Manitoba, were not applicable, but that the insurance was not unconditional as the Ontario statutory conditions though not printed on the policy were, under *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, to be given effect to.

Placing in the proofs of loss a grossly exaggerated value on the goods destroyed was *held* not to be fatal to the claim because admittedly the value was greater than the insurance and there was therefore no attempt to obtain payment of more than the claimant was really entitled to.

Edward Anderson, K.C., and R. D. Guy, for plaintiffs.

M. G. Macneil, and W. L. McLaws, for defendants.

MACDONALD, J.:—This action is founded on a policy of fire insurance issued by the defendant company to one W. Denby, for the sum of $1,500, covering stock of merchandise

at Burk's Falls in the province of Ontario, the stock having been damaged and in part destroyed by fire; the said policy and all benefits and interest therein having been assigned by the said Denby to the plaintiff company for the benefit of his creditors.

The defendant company alleges that there never was such a person as "W. Denby," and from the evidence it appears that the name is an assumed one and that the real name of the assured is "W. Denemburg," but for many years he has been known and has carried on business as W. Denby. Davidovitch, who is married to his daughter, and Finkelstein, who married his grand-daughter, the daughter of Davidovitch, both say they knew him by no other name. Leonard Gowing, a merchant of Burk's Falls, knew him for five years, and did not know him by any other name.

It is suggested that the name assumed concealed his nationality, which his real name would have revealed, and that had his nationality been known the insurance contract would not have been entered into. In view of the fact, however, that he had for years been known as Denby, I cannot conceive that his intention was to deceive, and furthermore, he did not solicit the insurance, but on the contrary, he was solicited for it.

The policy was issued on the 23rd day of May, 1912, although by error dated 1913; the fire occurred on the 17th August, 1912, and proofs of loss were duly made on the 25th September, 1912.

There are several grounds of defence to the action, but they are reduced to a few outstanding features, the main contentions are fraudulent representation inducing the contract and a fraudulent claim of loss.

Incendiarism through the wilful act of the insured has been urged, but the evidence does not, to my mind, justify a finding in favour of that contention. There may be suspicious circumstances surrounding the entire transaction, but that is all. If the act of the insured amounts to a crime and payment is resisted on that ground, it is necessary to adduce such evidence as would justify a conviction on a criminal charge for the same offence.

The contract for the insurance was negotiated in Ontario, but was completed in Manitoba, by the acceptance of the

risk and the issue of the policy. The goods insured were also situate in Ontario.

The Fire Insurance Policy Act, R. S. M. ch. 103, provides that the conditions set forth in the schedule to the Act shall as against insurers be deemed to be part of every policy of fire insurance entered into or renewed or otherwise in force in Manitoba with respect to any property therein. Now the property insured was not within Manitoba, and the endorsement of the conditions on the policy was not intended as conditions of the company to which the insured was assenting. Condition 8 for example could not possibly be so intended, as it applies to property in the city of Winnipeg and other parts of Manitoba, and to no other part of Canada.

Section 183 of the Ontario Insurance Act, R. S. O. 1914, ch. 183, provides that the conditions set forth in this section shall as against the insurer be deemed to be part of every contract in force in Ontario with respect to any property therein; and such conditions shall be printed on every policy with the heading "Statutory Conditions." The policy here has not the statutory conditions printed on it as required by the statute; but the effect of such omission and the penalty therefor is that the policy becomes subject to the statutory conditions only: Citizen Insurance Co. v. Parsons, 7 App. Cas. 96.

Now, the Ontario conditions forming part of this policy, wherein is there a breach of any of these conditions? The following is the most material. Sec. 18, sub-sec. c. requires the person making claim to furnish a statutory declaration declaring (inter alia) that the account is just and true, and sec. 20 provides that any fraud or false statement in any statutory declaration shall vitiate the claim of the person making the declaration.

The business, as already stated, was managed by Davidovitch, and all matter connected with proof of loss was prepared by him, but Denby must be held responsible for the actions of his manager and it must further be held that the claim of the plaintiffs is no stronger than would that of Denby, were he the plaintiff.

Now, what are the fraudulent representations inducing the contract? The insurance, as has been already observed, was solicited by a firm of brokers in Toronto. In his application the assured certifies that after diligent effort he has

been unable to procure the amount of insurance required to protect his property in insurance companies duly registered to transact business of fire insurance in the province of Ontario and that he has offered to pay the insurers the rate of premium stated, and yet the insurers complain that they have been deceived in the character of the risk. The application is for $6,000 insurance, and the stock and fixtures are valued at $11,000. It is contended by the defence that this is a false and fraudulent representation and that the value was grossly exaggerated. A stock book is produced shewing stock taking in the months of January and September, 1911, and June, 1912, and unless these lists are padded, the value placed by the assured upon his stock at the date of his application for insurance is within the mark. It is, however, a matter of comment that on the 17th August, 1912, the date of the fire, the stock on hand amounted to but $5,314.

There was a special summer sale by which the stock, it is claimed, was greatly reduced, but Davidovitch, the manager of the business, says that at the date of the fire the stock was $2,000 less than it was at the last stock-taking. This would make the value at the date of the fire about $9,000, assuming the fixtures to be a negligible quantity; but only $5,300 worth of stock can be accounted for at date of fire, and this is explained by Davidovitch claiming a total extinguishment of goods leaving no residue to make up the difference. Taking into consideration the character of the goods claimed to have been totally consumed, together with the evidence bearing upon this phase of the case, I have no hesitation in holding that no such quantity of goods was totally burnt up. The evidence on this point is conflicting, but there is no doubt that this estimate is entirely out of proportion to the actual loss.

The proof of loss makes claim to a total loss of $6,186.35; but included in this amount is $2,000, estimated goods destroyed leaving no remnants, that is, goods totally destroyed without any trace of them being left. Davidovitch says that the loss of goods totally destroyed was greatly in excess of $2,000—as it would have to be to bear out his figures—but that it was considered unnecessary to make this loss any greater as the insurance would not cover any greater amount.

It appears by the evidence that insurance to the extent of $6,000 was effected, but there is nothing to shew that any of

it was paid. $1,500 is the amount to which the defendant gave its indemnity and this is all that is sought to be recovered in this action; and the loss far exceeds that amount.

"Where an excessive and exaggerated claim is made by a policy holder, and resisted by a fire insurance company, such a claim will not preclude the policy holder from recovering the real value of the goods burnt and damaged unless the claim is fraudulently made by the policy holder in the sense of endeavouring to obtain from the company money he has no right to:" Norton v. Royal Fire and Life Assurance Co., 1 Times L. R. 469.

Now, does the statement in the statutory declaration claiming goods destroyed and no remnants to the value of $2,000 vitiate the claim? Had the claim been for $6,000 I think it would, but it seems to me that the statement must be material to the claim, and I cannot see how a claim for $1,500 on an ascertained loss of over $4,000, even if loss estimated at $6,000, can have such an effect.

If the assured had recovered other insurance, and to the extent of 4,500, I would consider that he had been almost, if not altogether fully indemnified for his loss, but there is no evidence that such is the case.

With some hesitation I have come to the conclusion that the plaintiffs are entitled to judgment for $1,500 with costs.

SASKATCHEWAN.

JANUARY 9TH, 1915.

SUPREME COURT EN BANC.

GREEN v. CANADIAN NORTHERN RY. CO.

Arbitration and Award—Dominion Railway Act—Method of Computing Compensation—Arbitrators' Fees Not to be Added to Award—Sec. 199 of Act—Arbitrators no Right to Allow Interest on Amount of Compensation and to Include it in Award — Appeal from Award — Principles Governing Court.

Compensation for land taken is to be estimated upon the following principles: (1) the value to be paid for the land is the value to the owner as it existed at the date of the taking, not the value to the taker; (2) the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Cedar Rapids v. *Lacoste*, [1914] A. C. 576; *The King* v. *Trudel*, 49 S. C. R. 511: followed.

The court is entitled and bound to come to its own conclusion upon all the evidence, and is also entitled to disregard the reasoning of the arbitrators if it does not agree with it, or to adopt it if it so desires, or to support the award on any ground sufficient in law, whether or not that ground is relied on by the arbitrators, provided that the court pays due regard to the award and findings and reviews them as it would that of a subordinate court.

Re Ketcheson and Canadian Northern Ontario Rw. Co., 29 O. L. R. 347.

An arbitrator has no right to add his fees to an award and make them a part thereof.

An arbitrator has no right to allow interest on the amount of compensation awarded and to include it in his award.

Re Ketcheson and Canadian Northern Ontario Rw. Co., 29 O. L. R. 347, followed.

An appeal from an award made to respondent under the provisions of the Dominion Railway Act.

The appeal was heard by HAULTAIN, C.J., LAMONT, BROWN, and ELWOOD, JJ.

J. A. Allan, K.C., and J. E. Caldwell, for appellant.

W. E. Knowles, for respondent.

The judgment of the court was delivered by

ELWOOD, J.:—On behalf of the appellant a number of grounds of appeal were taken, but for the purposes of this appeal it seems to me only necessary to deal with a few of

those. The arbitrators in their award and in their reasons for the award have allowed compensation, first, for land actually taken, anad second, for damage which, they find, is sustained to certain portions of the land of the respondent by reason of the construction of the railway. In addition to the above, the arbitrators fixed their fees at $6,750, which they added to and declared to form part of the award; and they also allowed to the respondent interest on the amount of compensation thereby awarded to him, for the land taken and the land injuriously affected on the south-east half of section 29, as from the 21st of May, 1912, and for the land taken and the land injuriously affected on the east half of section 20, from the 14th September, 1912.

So far as the amount allowed as compensation for the land taken and the land injuriously affected is concerned, the only evidence given on behalf of the respondent with respect to the value of the land taken and affected was evidence which shewed that a great deal of land surrounding and in the neighbourhood of the land in question had been subdivided into city lots, that some of this land had been sold, that some had not been sold, and a list of prices at which the lots in these various sub-divisions had been sold was given and a comparison of prices that might be got for the land in question were it subdivided was made. It seems to me that throughout the whole of the case for the respondent it was assumed that because certain subdivisions situated similarly to that of the respondent had sold at certain prices, therefore the land of the respondent would, if subdivided, sell for the same price. On the other hand, evidence on behalf of the appellant was given as to the value of the lands having in view the possibility of the lands being subdivided.

The principle upon which compensation is to be awarded is stated in Cedar Rapids v. Lacoste, [1914] A. C. at p. 576, where I find the following:—

"The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of In re Lucas and Chesterfield Gas & Water Board, where Vaughan Williams and Fletcher Moulton, L.JJ., dealt with the whole subject exhaustively and accurately.

"For the present purpose it may be sufficient to state two brief propositions:—(1) The value to be paid for is the value

to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined."

This principle is followed in The King v. Trudel, 49 S. C. R. p. 511.

Applying the above principle to the case at bar, it seems to me that the only evidence which is of value in determining the value of the property taken and injuriously affected is that given on behalf of the appellant. The arbitrators, in their reasons for award, have fixed the following values, namely: the high lands on the north-east quarter of 20, $500 an acre; the high lands on the south-east quarter of 20, $300 an acre; the south-east of 29, $1,150 an acre. I am unable to see how the arbitrators could have arrived at the above figures except by assuming that if the lands were subdivided they might realise the above sums, but there was no evidence before them which would justify them in coming to the conclusion that the above sums were the values of the land to the owner as it existed at the date of the taking. A number of witnesses gave evidence on behalf of the appellant as to the value, and the highest valuations put upon the land were by the witness Caulder. He valued the south-east quarter of 29 in the spring of 1912 at $500 an acre, the south-east of 20 in the fall of 1912 at $200 an acre, and the north-east of 20 in the fall of 1912 at $400 an acre. The time at which the valuation should be placed upon the land is, as to the south-east quarter of 29, the 21st May, 1912, and the east half of 20, on the 14th September, 1912. The arbitrators, in referring to the evidence of Caulder, state that he valued the south-east of 29 at $700 an acre in the fall of 1912. I have looked carefully through the evidence, and find that his valuation is $600 in the fall of 1912, but it is $500 in the spring of 1912. In my opinion the above valuations given by Caulder are the ones which should govern in arriving at an estimate of the amount of compensation to be paid. The arbitrators found as a fact that certain portions of the land had been injuriously affected as follows: the high lands on the north-east of 20, 10 per cent; the high lands on the south-east of 20, 10 per cent.; and the south-east of 29 as follows: Parcel B., 14 per cent.; Parcel C., 7

per cent.; Parcel D., 40 per cent.; Parcel A., 7 per cent.; Parcel E., 7 per cent.; the percentage of Parcel F. is not given, but I shall refer to that later. There was evidence which would justify the arbitrators in coming to the conclusion that the above parcels of land had been damaged to the extent to which they found in the award they had been damaged, and under these circumstances I do not think that we should disturb that finding. The principle which should govern the court seems to me to have been properly stated in Re Ketcheson and Canadian Northern Ontario Ry. Co., 29 O. L. R. at p. 347, where Hodgins, J.A., states:—

"In other words, I think that this court is entitled and bound to come to its own conclusion upon all the evidence, and is also entitled to disregard the reasoning of the arbitrators if it does not agree with it, or to adopt it if it so desires, or to support the award on any ground sufficient in law, whether or not that ground is relied on by the arbitrators, provided that the court pays due regard to the award and findings and reviews them as it would that of a subordinate court."

Allowing the respondent the percentages of damage found by the arbitrators to have been sustained, and applying those percentages to the valuations which, in my opinion, the arbitrators should have found had they followed the principle above stated in Cedar Rapids v. Lacoste, I would allow the following sums:—

For land taken for right of way through the south-east quarter of 29, 6.58 acres at $500 an acre	$ 3,290 00
For land taken for right of way through the south-east quarter of 20, 4.05 acres at $200 an acre	810 00
For land taken for right of way through the north-east quarter of 20, 6.37 acres at $400 an acre	2,548 00
For 10% damage to the north-east quarter of 20, 153.60 acres at $400 an acre	6,144 00
For damage to the south-east quarter of 20, 10% 45.05 acres at $200 an acre	910 00
For damage to the south-east quarter of 29: Parcel B., 27.09 acres, 14%	1,953 00
Parcel C., 7.1 acres, 7%	248 50

Parcel D., 7.4 acres, 40%	1,480 00
Parcel A., 9.1 acres, 7%	318 50
Parcel E., 50.18 at 7%	1,756 30
In Parcel F. the percentage of damages is not given in the award, nor in the reasons for the award, but the damage is evidently figured at the land being worth $1,150 an acre. As I have stated above, the land should have been valued at $500 an acre, and, valuing it at $500 instead of $1,150 an acre, the damage sustained with respect to Parcel F. would be	4,108 30
	$23,566 60

In my opinion, therefore, the amount allowed as compensation for the land taken and for the land injuriously affected should be reduced to $23,566 60, which is the sum I would allow.

So far as the arbitrators' fees are concerned, the arbitrators, in my opinion, had no right to include them in and make them part of the award. Their fees are governed by sec. 199 of the Railway Act, and in the event of the parties not agreeing upon the amount of costs, those costs will have to be taxed by the judge as provided by the Act. Therefore the portion of the award which fixes the amount of the arbitrators' fees and adds that to the award must be struck out.

So far as the interest is concerned, the arbitrators had no power to include that in their award, as the right to interest is statutory. See in Re Ketcheson and Canadian Northern Ontario Ry. Co. (ante), at p. 349. The provisions as to interest, therefore, should be struck out.

The respondent should pay the appellant's costs of this appeal.

SASKATCHEWAN.

HAULTAIN, C.J. JANUARY 18TH, 1915.

CHAMBERS.

ROYAL BANK OF CANADA v. LEE AND GIRARD.

Creditors' Relief Act, sec. 8 — Formal Defects in Order — District Court Judge Inadvertently Signing as Local Master — Order Improperly Styled — Power of Judge Making Order to Cure Defects—Judge Acting as Persona Designata—Appeal—R. S. S. ch. 55, sec. 6, as Amended by Statutes of 1913, ch. 67, sec. 12.

The validity of an order made by a district court judge under sec. 8 of the Creditors' Relief Act is not affected by the fact that the judge, through inadvertence, signed the order as local master instead of as judge of the district court.

Where an order made under sec. 8 of the Creditors' Relief Act is not styled 'In the matter of The Creditors' Relief Act,' the judge who made the order has power under sec. 16 of the Act to cure the defect if it is quite plain from the nature of the order that it was made under the provisions of the said Act.

There is no appeal from the order of a judge acting as *persona designata* under the Creditors' Relief Act unless special leave has been given, by virtue of R. S. S. ch. 55, sec. 6, as amended by statutes of 1913, ch. 67, sec. 12.

In Re Humberston and the City of Edmonton, 14 W. L. R. 492, referred to.

P. H. Gordon, for appellant.

P. E. MacKenzie, K.C., for respondent.

HAULTAIN, C.J.:—A certain amount was paid into court to the credit of the cause in the case of J. E. Girard, plaintiff, and Boucher and Tournier, defendants, and Commercial Union Insurance Co. et al., garnishees. Certain claims upon this money were made, and on the 6th of November, 1914, the Local Master at Sakatoon adjudicated upon these claims, and by his order of that date ordered one of the claims to be paid, barred another claim, and ordered that the balance of the money in Court, after payment of the claim allowed, should be paid out to the solicitors of the plaintiff Girard. On the same day the sheriff served a notice on the local registrar at Saskatoon claiming payment to him of a sufficient amount of any money in court belonging to Girard to satisfy the execution of the Royal Bank, the plaintiffs in

the present action, against the defendant Girard. On the 9th of November an order was made under sec. 8 of the Creditors' Relief Act (R. S. S. ch. 63), by which it was ordered that a sufficient amount of "the moneys standing in court to the credit of Joseph E. Girard" should be paid out to the sheriff to satisfy the above-mentioned execution. This order was made ex parte. The defendant appealed from this order to a judge in chambers, and my brother Brown dismissed the appeal on the ground that as the order was made ex parte an application should have been made to the judge who granted the order for a re-hearing. The order of the 9th of November was not styled, "In the matter of the Creditors' Relief Act," and underneath the signature of the judge the initials "L.M." appear. The plaintiffs served notice of motion to rectify this order by adding to the title the words "In the matter of the Creditors' Relief Act," and by striking out the words "Local Master" and substituting "District Court Judge." On the hearing of this application similar objections were taken on behalf of the defendant Girard to the granting of the order as were taken on the appeal which was heard by my brother Brown. The learned district court judge, however, by order of the 3rd December, rectified the order as requested. The defendant Girard now appeals from that order.

I do not think that the initials "L.M." in the order of the 9th November made any material difference. The application was clearly made under sec. 8 of the Creditors' Relief Act, and the fact that the learned district court judge signed the order over the initials "L.M." instead of "J.D.C." evidently through inadvertence, should not, in my opinion, effect the validity of the order. The order was made by the proper person, and the initials may be treated as surplusage.

These proceedings should undoubtedly have been styled, "In the matter of the Creditors' Relief Act," but it is quite plain from the nature of the order that it was made under the provisions of that Act, and I think that the judge had ample power, under sec. 16 of the Act, to cure irregularities and defects. The position created by the two orders of the 6th and 9th of November is somewhat peculiar. On the 6th November Judge McLorg, as Local Master, ordered the balance of the money in court in the cause of Girard v. Boucher

et al. to be paid out to Girard's solicitors. On the 9th November, while this order was still in full force, as persona designata under the Creditors' Relief Act he ordered the same money, or part of it, to be paid out to the sheriff to satisfy the execution in the present action. His power to do this is at least open to question. It might also, in my opinion, be argued that on the 9th of November there was no money in court "to the credit of Joseph E. Girard," in view of the fact that under the order of the 6th November any money that might have belonged to Girard had been ordered to be paid out to his solicitors. These questions unfortunately, I think, cannot be dealt with here. Section 6 of an Act respecting Judges' Orders in Matters not in Court (R. S. S. ch. 55), as amended by sec. 12 of ch. 67 of the statutes of 1913, provides that "there shall be no appeal from the order of a judge made by him as persona designata unless an appeal is expressly authorised by the Act giving the jurisdiction, or unless special leave is granted by the said judge, or where such judge is a judge of a district court, "by a judge of the Supreme Court." An appeal is not authorised by the Creditors' Relief Act, and special leave to appeal has not been granted. See In re Humberston and City of Edmonton, 14 W. L. R. 492. The notice of appeal ignores the fact that the order appealed from was made by the District Court Judge "in the matter of the Creditors' Relief Act." The notice of motion to rectify the order of the 9th November expressly stated that the application would be made to "the District Court Judge as persona designata under the Creditors' Relief Act," and the order was made by him in that capacity. I was not asked, and I do not think I could have been asked, to grant the special leave to appeal ex post facto, in view of the position taken by the defendant.

Both the appeal and cross-appeal must therefore be dismissed, but without costs.

Appeal and cross-appeal dismissed.

SASKATCHEWAN.

ELWOOD, J. DECEMBER 24TH, 1914.

CHAMBERS.

LUMBER MANUFACTURERS' YARDS, LTD. v. MOOSE JAW FLOUR MILLS, LTD. ET AL.

Practice—Discovery—Production of Documents—Rule 274—Parties—Joinder—Mortgage Action—Prior Mortgage—When Prior Mortgagee to Be Joined as Defendant—Affidavit of Documents—Not Conclusive Against Deponent—Place of Production—By Whom Determined.

In an action brought for payment of a mortgage there must be an offer to redeem, either expressly or impliedly, in the pleadings in order to justify the joining of a prior mortgagee as a party to the action.

Gordon v. *Horsfall*, 13 E. R. 542; *Hughes* v. *Cook*, 34 Beav. 407; *Jeffreys* v. *Dickson*, L. R. 1 Ch. 183; *Rogers* v. *Lewis*, 12 Grant. 257: referred to.

Elmer v. *Creasy*, L. R. 9 Ch. 69; *Wickendon* v. *Rayson*, 6 DeG. McN. & G. 210: distinguished.

Under Rule 274 production should not be ordered by a defendant who alleges in the pleadings that he is not a proper party to the action until the determination of that question.

The affidavit of documents is conclusive against the party seeking discovery, but not against the deponent; the latter is not restricted to the grounds set forth in the affidavit when resisting discovery.

A local master has power to order production of documents at a place outside the jurisdiction of the court since the determination of the place for production is within the discretion of the judge of first instance, and that discretion should not be interfered with.

Bustros v. *Bustros*, 30 W. R. 374, followed.

H. J. Schull, for plaintiff.

G. E. Taylor, K.C., for defendant, Webster.

ELWOOD, J.:—This is an appeal from an order of the Local Master at Moose Jaw ordering the defendant Webster to produce at Montreal, in the province of Quebec, for the plaintiff's inspection, a certain promissory note endorsed to the defendant Webster and the debentures of the defendant the Moose Jaw Flour Mills Co. Ltd., to the amount of $250,000, and directing that the defendant should undertake to pay any additional costs which the judge at the hearing of the action might hold to have been reasonably incurred by reason of the production of the above at Montreal instead of

at Moose Jaw, and ordering the defendant to pay the plaintiff's costs of the application in any event of the action, on the following grounds, namely: that the said Local Master had no power to order production of the said documents at a point outside the jurisdiction of the court or to order the same to be brought from a point outside the jurisdiction of the court into the jurisdiction of this court, or to impose on the defendant any terms or conditions whatever; and upon the further ground that the said Webster is not a proper party to the plaintiff's action, it having been alleged by the defendant in the pleadings that he is not a proper party thereto, and that until the said issue be determined in favour of the plaintiffs the plaintiffs are not entitled to require production for inspection of the documents from this defendant.

This action was brought by the plaintiffs for payment of a mortgage made by the defendant, the Moose Jaw Flour Mills, Ltd., in favour of the plaintiff, and, inter alia, the statement of claim states as follows:—

"8. That the defendant Prudential Trust Company is the holder of a mortgage upon said premises for $250,000, dated the 2nd day of June, 1913, and registered in the Land Titles Office for the Moose Jaw Land Registration district on the 4th day of July, 1913, at 3.50 o'clock in the afternoon of said day, as No. V. 937; that said mortgage was executed for the purpose of securing the payment of certain debentures intended to be issued by the said defendant, Moose Jaw Flour Mills, Limited, aggregating in amount the said sum of $250,000; that the defendant, Prudential Trust Company is made a party to this action not only on behalf of itself, but as trustee for all persons who may thereafter have become holders of said bonds.

"13. That the defendant Lorne C. Webster claims to be the holder of certain of the bonds for which said mortgage in favour of the Prudential Trust Company was executed as security and the said defendant Lorne C. Webster is made a party hereto for the purpose of determining his rights under said mortgage held by the Prudential Trust Company by virtue of said bonds.

"15. That the plaintiff is informed and believes and states the fact to be that said bonds of the Moose Jaw Flour Mills, Limited, aggregating in amount $250,000 were delivered to the defendant Lorne C. Webster as collateral secur-

ity for certain advances made by the defendant Lorne C. Webster, the exact amount of which said advances is unknown to the plaintiff; that the defendant Moose Jaw Flour Mills, Limited, have been endeavouring and are now endeavouring to dispose of the entire issue of said bonds at a sum considerably below par and there is grave danger of said bonds being disposed of at a price considerably below par, and a charge thereby made operative upon said premises vastly in excess of that now existing and in an amount in excess of the value of said premises unless the said defendant Moose Jaw Flour Mills, Limited, be restrained by order of this court from in any manner disposing of said bonds; that the defendant Moose Jaw Flour Mills, Limited, are now insolvent and are wholly unable to meet their obligations and if the said bonds are disposed of and placed in the hands of purchasers thereof, the security of the plaintiff will be greatly diminished and rendered valueless by reason of the fact that the said mortgage held by the Prudential Trust Company will become a subsisting charge upon said premises for $250,000 prior to that of the plaintiff."

In the prayer for relief the plaintiff claims:—

(a) Judgment against the defendant the Moose Jaw Flour Mills, Ltd., for the amount of its mortgage;

(b) A declaration that the said sum constitutes a valid lien upon the mortgaged premises;

(c) That accounts be taken for the purpose of determining the amounts, if any, due to the defendant Lorne C. Webster under the bonds claimed to be held by him;

(d) An order for payment into court by the defendant the Moose Jaw Flour Mills, Ltd., of the amount due to the plaintiff.

(e) In default of such payment, an order for the sale of the mortgaged premises and the proceeds of the sale to be applied, after payment of the costs incurred thereby and the costs of this action, in payment of the plaintiff's claim;

(f) That the balance, if any, be paid into court to abide the further order of the court.

(g) An injunction restraining the Moose Jaw Flour Mills, Ltd., its officers, agents, etc., from making any further disposition of the above bonds, and for an order of cancellation of all of the said bonds not theretofore issued and disposed of.

In view of the conclusion that I have come to, it is not necessary that I should express any opinion as to some of the objections raised on behalf of the defendant Webster.

In the case of Whyte v. Ahrens, 50 L. T. R. 344, at 346, I find the following:—

"In some cases it may be perfectly right when there is a plea which, if sustained, would prevent the necessity of discovery, or which would then be a bar to the right to the discovery, that that should be settled first."

Rule 274 of our Rules of Court provides as follows:—

"If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection."

The defendant Webster contends that he is not a proper party to this action, and that, not being a proper party, he cannot be compelled to produce the documents in question for inspection. A number of cases were cited to me as holding that in an action of this kind the defendant Webster is not a proper party. It will be noticed that the defendant Webster is not a mortgagee, and he can only be joined as a party, I apprehend, because the plaintiff is of opinion that as the holder of the bonds he is interested in the mortgage held by the Prudential Trust Company as security for the bonds, and it will be perceived that that mortgage is a charge on the property prior to the mortgage to the plaintiff. The law, in my opinion, seems to be well established that where the validity of the prior mortgage is not attacked, there must be an offer to redeem either expressly or impliedly in the pleadings in order to justify the joining of the prior mortgagee as a party to the action. See Gordon v. Horsfall, 13 E. R. 542; Hughes v. Cook, 34 Beav. 407; Jeffreys v. Dickson, L. R. 1 Ch. A. 183; Rogers v. Lewis, 12 Grant 257; Fisher on Mortgages, Can. ed., pars. 1377 & 1378. The cases of Elmer v. Creasy,

L. R. 9 Ch. A. 69, and Wickenden v. Rayson, 6 DeG. McN. & G. 210 were cited on behalf of the plaintiff as authority for the proposition that a prior mortgagee was a proper party to the action. The former case, however, was a redemption suit, and the latter was an administration suit which inter alia asked for directions to redeem the prior mortgage, so that those cases are quite distinguishable from the present. I am therefore of the opinion that this defendant was not a proper party to the action. There was no question raised by the pleadings as to the validity of the documents production of which is sought, but merely a request for an account to be taken of the amount due. It seems to me, therefore, that under Rule 274 above referred to no production should have been ordered until the question of whether or not the defendant was a proper party to the action had been determined.

The plaintiff's counsel objected that as the affidavit of documents did not raise the objection which is taken here, discovery could only be resisted on grounds contained in the affidavit of documents. I cannot find any authority for that proposition. I can find authority for the proposition that the affidavit of documents is conclusive as against the party seeking discovery, but I cannot find any authority for the proposition that it is conclusive as against the party making the affidavit, but that the party resisting discovery is restricted to the grounds set forth in the affidavit when an application is made to force him to produce. The fact that sufficient grounds are not stated in the affidavit might, however, be a question to be considered when dealing with the question of costs. The defendant's counsel asked me to turn this application into a motion for judgment under Rule 442. Counsel for the plaintiff, however, stated that if an order were made striking out the defendant Webster he would apply to amend by offering to redeem. I think, in view of this, that I shall not deal with the application to order judgment on the pleadings as they are at present, but leave it to either party to make a substantive application, either to set down for hearing the question of whether or not there is a cause of action against the defendant, or to apply to amend the claim by offering to redeem.

There was a cross-appeal on behalf of the plaintiff claiming to be entitled to production of the documents in Moose Jaw rather than in Montreal. In view of the conclusion I

have come to, it will be unnecessary for me to deal with the cross-appeal, but I may say that I think the Local Master was quite correct in ordering the production of the documents in Montreal, and in the case of Bustrôs v. Bustrôs, 30 W. R. 374, it was held that the place at which documents should be produced was a matter purely within the discretion of the judge of the first instance, and that the Court of Appeal ought not to interfere with this discretion. Therefore in no event would I have interfered with the discretion of the Local Master in ordering the production at Montreal instead of at Moose Jaw. I think, however, that he erred in making any order as to the costs of production in Montreal rather than at Moose Jaw. However, it is not necessary that I should express any decided opinion upon that point.

The result will be that the appeal will be allowed and the application to the Local Master to compel production of the documents mentioned therein dismissed, the defendant Webster to have in any event of the action his costs of that application and of this appeal. In the event of the plaintiff amending its statement of claim and offering to redeem the result of this appeal will of course be no bar to the plaintiff's right to make a fresh application if it is necessary.

Appeal allowed.

SASKATCHEWAN.

HAULTAIN, C.J. JANUARY 27TH, 1915.

TRIAL.

WHITE v. DUNNING AND BROWN.

Criminal Law—Warrant in First Instance—Justice Need Not Hear Witnesses for Complainant Before Issuing—Sec. 655 of Criminal Code, as amended by 8-9 Edw. VII., ch. 9—Exercise of Discretion by Justice—When Not to be Interfered with.

Sec. 655 of the Criminal Code, as amended by 8-9 Edw. VII. ch. 9, does not require a justice of the peace to hear the witnesses for the complainant before issuing a warrant of arrest, but only provides that if any witnesses are produced their evidence must be given upon oath and taken down in writing.

The mere fact that a summons might have been issued or would have been sufficient in the opinion of a judge is no ground for interfering with the discretion exercised by a justice of the

peace under sec. 655 of the Code, as amended, in issuing a warrant so long as there were some facts upon which that discretion might reasonably have been exercised.

J. F. Frame, K.C., for plaintiff.

P. C. MacKenzie, K.C., for defendants.

HAULTAIN, C.J.:—This case, so far as it concerns the defendant Brown, turns altogether, in my opinion, on the construction of sec. 655 of the Criminal Code, as amended by the Criminal Code Amendment Act, 1909, 8-9 Edw. VII., ch. 9.

The facts are as follows: The plaintiff's son, a boy about four years old, had been assaulted by a young boy, the son of the defendant Dunning. The plaintiff followed the Dunning boy and caught him and assaulted him somewhat severely by slapping and kicking. The defendant Dunning was informed by some unknown person over the telephone and in the course of his inquiry was informed by one Alderson, an alleged eyewitness of the assault, that the assault was committed by a Mrs. Annie White, who lived in a house near by. The boy also told him that he had been beaten by a woman called White.

Dunning then took the boy to the house of the defendant Brown, who is a justice of the peace and police magistrate for the City of Saskatoon and laid an information for common assault against "Mrs. Annie White." According to the evidence of both defendants, Dunning explained the circumstances to Brown, told him that he had not seen the assault himself, but he was informed that it was committed by a woman called Mrs. Annie White. The defendant Brown says that Dunning did not ask for the issue of a warrant, but that he issued the warrant himself, thinking it to be his duty particularly owing to the age of the child and the nature of the injury.

A warrant was issued and given to Dunning, who handed it to Sergeant Devereux, of the Saskatoon Police, for execution. The plaintiff was arrested on this warrant, and, on being charged the next morning before the defendant Brown, as police magistrate, pleaded guilty to the charge of common assault and was fined $10 and costs and bound over to keep the peace for twelve months.

It is contended on behalf of the plaintiff "that the warrant of arrest was illegal and void because the justice of the

peace did not hear and consider any allegations of any of the complainant's witnesses or of the complainant." Section 655, as amended, does not require witnesses to be produced, but only provides that if any witnesses are produced, their evidence must be given upon oath and taken down in writing. The evidence shews that the justice of the peace did hear the allegations of the complainant Dunning and saw the boy who had been assaulted, took into consideration his age and the nature of the injuries inflicted, and then considered it to be his duty to issue a warrant. In issuing the warrant under these circumstances, he was, in my opinion, exercising his discretion given to him by the section above mentioned, and I do not think that the facts of the case warrant a finding that that discretion was not properly exercised. The mere fact that, in my opinion, a summons might have been or would have been sufficient in this case would not be a ground for interference. The facts that would move one man in one direction might quite reasonably move another in another direction. So long as there are some facts upon which the action in question might not unreasonably be taken, the discretion exercised should not be questioned.

I should like to make some comment on the form of the information taken in this case. Both defendants testify that at the time the information was taken, it was distinctly stated and understood that Dunning had no personal knowledge of the circumstances. Yet he takes and is allowed to take a positive oath that the offence was committed, and Mr. Brown, the police magistrate, made the somewhat startling statement that he would always take an information in that form from a "reputable man," although he knew that the informant could only swear to information and belief. This, in my opinion, is a most reprehensible practice and should not be continued. Section 654 of the Criminal Code provides that "Any one who, upon reasonable or probable grounds believes that any person has committed an indictable offence may make a complaint or lay an information in writing under oath." If the reasonable or probable grounds for believing that an offence has been committed are anything less than the actual knowledge of an eyewitness, the information should be worded accordingly. At least, the same care should be taken in this matter as is taken every day in the preparation of affidavits in civil actions.

In view of the foregoing, it will not be necessary for me to consider a number of other questions which have been raised by counsel on both sides in this case.

The action against both defendants is dismissed with costs. Even if I found against the defendant Brown on the point which has been discussed, I should still hold that there was no action against the defendant Dunning. He was not responsible for the issue or execution of a warrant which on the face of it was issued by a justice of the peace having full jurisdiction in the matter.

Action dismissed.

SASKATCHEWAN.

JANUARY 9TH, 1915.

SUPREME COURT EN BANC.

NATIONAL TRUST CO. LTD. v. NADON.

Principal and Agent—Purchaser Appointing Agent to Sign Agreement to Purchase Land—Agreement Not Required to be Under Seal—Appointment of Agent.

Where an agent is authorized to sign an agreement which does not need to be under seal, the appointment of the agent need not be under seal or even in writing.

Bulk Sales Act — Waiver of Compliance With — Right of Official Assignee to Sue Before Assignment — Sale of Hotel Business—Amendment—Addition of Assignor as Party Plaintiff.

A purchaser of a hotel business cannot raise the question of non-compliance with the Bulk Sales Act after he has obtained a transfer to the property, registered the transfer, executed a mortgage and promissory notes in accordance with the agreement of sale, entered into possession of the property, made very material alterations in the building, taken a transfer of the license, and thereafter continued to occupy the property.

The Bulk Sales Act does not give the official assignee thereunder the right to sue for money or property before it has been transferred or assigned to him, but where it appeared from the pleadings that the action was in reality brought on behalf of the assignor in the name of the assignee, leave to amend by adding the name of the assignor as a party plaintiff was granted.

Hughes v. *The Pump House Hotel Co. Ltd.*, [1902] 2 K. B. 485, referred to.

The appeal was heard by HAULTAIN, C.J., LAMONT, BROWN, and ELWOOD, JJ.

E. B. Edwards, K.C., for defendant, appellant.

W. M. Martin, for plaintiff, respondent.

The judgment of the Court was delivered by

ELWOOD, J.:—The agreement under which this cause of action arises was one entered into between the St. Regis Hotel Co. Ltd., as vendor, and Joseph Paquette, as purchaser, but was executed by the St. Regis, Limited, as vendor, and the evidence shews that the correct name of the vendor is the St. Regis, Limited. At meetings of the directors and shareholders of the St. Regis, Limited, the sale was ratified. The evidence also shews that in signing the above agreement the said Joseph Paquette was acting for and on the authority of the defendant. The transfer of the land covered by the agreement was made to the defendant, the liquor license for the hotel situated on the said land was assigned to the defendant, the defendant executed a mortgage and signed promissory notes given to secure the purchase-price of the property covered by the agreement, and the defendant entered into possession of the property covered by the agreement and thereafter continued to treat the same as his own. There can be no doubt, from all of the evidence, that Paquette, in signing the agreement, did so as agent for the defendant, and that the intention was that the agreement was to be the agreement of the defendant. The agreement was one which did not require to be under seal, and in such case the appointment of Paquette did not require to be under seal, or in fact in writing, and in my opinion the defendant can be sued under the agreement. See Halsbury, vol. 1, par. 339; Hunter v. Parker, 7 M. & W. 324, at 344; Halsbury, vol. 1, par. 439 & 440. The agreement above referred to inter alia provides as follows:—

"The vendor agrees to furnish the purchaser with all declarations required under the Bulk Sales Act of the province of Saskatchewan not later than the 27th day of August, 1913, and further to satisfy the purchaser that all the requirements of the Bulk Sales Act have been fully complied with, and that all mortgagees or other parties having encumbrances or claims against the property hereby sold are

provided for and have been satisfied to the extent that the sale hereby agreed upon cannot be annulled."

It was contended that the St. Regis, Limited, had not satisfied the purchaser that all the requirements of the Bulk Sales Act had been fully complied with. The property agreed to be sold by the agreement was lot 6 in block F. in a subdivision of Prince Albert, together with the buildings erected thereon and all furniture, furnishings and fittings then in or used in connection with the hotel erected on the said ground, and the license for the hotel, and the goodwill of the said hotel, and all the interest of the vendor in a party-wall agreement; and the purchaser further agreed to take over the stock of wines, liquors, etc., and supplies then in the hotel at invoice price. The money which is now being sued for does not cover any portion of the said stock of wines, liquors or supplies, and no question arises with respect to them. The Bulk Sales Act sets forth what would be covered by that Act, and in my opinion none of the property sold, with the exception of the liquor license, would be covered by the Act, and therefore, with the exception of the money to be received for the transfer of the liquor license, it would be unnecessary to furnish the purchaser with any evidence that the Bulk Sales Act had been complied with. The price that was to be paid for the transfer of the liquor license was unascertained, but in any event the price, I apprehend, would not be more than the sum which would represent the proportionate cost of obtaining a license for the unexpired portion of the then current term of the license. This amount would be very much less than the portion of the purchase-price which had been transferred to the plaintiff by the above mortgage and notes. The evidence shewed that the defendant had been furnished with the declaration required by the Bulk Sales Act, and that on the 8th September, 1913, 60 per cent. of the creditors of the St. Regis, Limited, executed a consent to the sale of the property. Objection, however, was made that that consent was not to a sale in the exact terms of the agreement of sale; that the agreement of sale provided for payment of one or two accounts in full, and that the consent did not specify that these accounts were to be paid in full. I do not, however, entirely agree that that is the effect of the consent; but whether it is or not, the sum which would be required to pay these particular claims in full would still leave in the hands

of the plaintiff a sum much in excess of the money which would be payable under the Bulk Sales Act; and in fact the agreement provided that the sums which were to be applied in payment in full of the above creditors were to be retained out of the purchase-price by the purchaser, and the mortgage and promissory notes above referred to were in addition to the sums which were retained to pay these other creditors in full. It seems to me, also, that the defendant cannot now raise the question of non-compliance with the Bulk Sales Act. He obtained a transfer to the property, registered the transfer, executed the mortgage and promissory notes, entered into possession of the property, made very material alterations in the building, took a transfer of the license, and has since occupied the property. Under these circumstances it seems to me that in any event he has waived his right to insist upon any further compliance with the Act. There was a further objection that there were a number of encumbrances on the property, and these had not been removed. The mortgage which the defendant executed expressly provides that the mortgagee will, out of the proceeds of the mortgage, pay off the existing mortgages, liens and encumbrances; and it was certainly the intention of the parties that these encumbrances should not be paid off except out of the mortgage. The evidence shews that Mr. Adam, who was acting for all parties, had arranged with the holders of the various mortgages and liens for extensions until the moneys could be collected in. It was objected further that there could be no right of action with respect to the commission and the various sums payable to the Banque d'Hochelaga, Dangerfield & Sons, and Dangerfield, because they were to be retained out of the payment now sued for. So far as the commission is concerned, it has been paid, one-half of it by a promissory note given by the defendant, and the other by moneys paid by the plaintiff with the knowledge of the defendant. So far as the other sums are concerned, the defendant has not paid these sums, and the plaintiff, or rather the St. Regis, Limited, had the right to compel the defendant to pay these sums, and, if they were not paid within a reasonable time could, it seems to me, bring an action for them. It was also objected that there was no pledge, charge or lien in favour of the plaintiff of the securities mentioned in the statement of claim. The evidence shews that the defendant, at the

time of the assignment of the license, was to make the cash payment sued for. At the time of the assignment this cash payment was not made, but the defendant informed the plaintiff that these securities were in the bank for the purpose of raising the money, and that the money would be paid out of these securities; and I am satisfied that the assignment of the license was made in consideration of that undertaking, and I am therefore of the opinion that the St. Regis, Limited, is entitled to have these securities used for the purpose of realizing this sum.

At the trial it was objected that the plaintiffs had no right to sue the defendant, that there was no privity of contract, there had been no assignment. When this objection was taken, the learned trial judge expressed the opinion that there did not require to be any transfer, that the plaintiff had the right to sue. On the bringing of this appeal counsel for the defendant took the above objection. I am of opinion that the present plaintiffs have no cause of action against the defendant. The contract sued on is with the St. Regis, Limited, and there was no privity of contract between the plaintiff and the defendant. The Bulk Sales Act, even if it applied to the cause of action, does not give the plaintiffs the right to sue. The official assignee under that Act is not entitled to take or sue for the money or property until it has actually been transferred or assigned to him. Counsel for the plaintiff asked that if the objection were well taken, leave should be given to the plaintiff to amend by adding the St. Regis, Limited, as a party plaintiff. The defendant's counsel opposed this, and among other things stated that while there had been evidence offered on behalf of the defendant on various issues raised, yet the defendant, having been satisfied that the plaintiff was not entitled to sue, may not have offered all the evidence that could have been offered on the various issues, and intimated that a trial between the St. Regis, Limited, and the defendant would raise issues other than those raised in the present action, and in any event the defendant would possibly be able to produce evidence in addition to the evidence adduced in the previous action. I am of opinion that this amendment should be allowed. The real issue between the parties was not a question of whether or not the plaintiff had the right to sue, but was whether or not any person was entitled to recover

this money from the defendant. The pleadings shew that the action was practically brought on behalf of the St. Regis, Limited, and on behalf of the creditors of the St. Regis, Limited; and therefore, under all the circumstances of this case, the amendment should be allowed. See our Rules Nos. 31, 32, 41; Annual Practice (1914), pp. 214-15; and the case of Hughes v. Pump House Hotel Co. Ltd., [1902] 2 K. B. 485. At p. 487, Collins, M.R., said:—

"The plaintiff commenced an action against the defendants, and a question arose whether the plaintiff had made an absolute assignment of his claim against the defendants, or only an assignment by way of charge only, and on the decision on that point depended the plaintiff's right to bring an action. Wright, J., took one view of the case, and the Court of Appeal took another, and that in itself is evidence that the plaintiff had made a bona fide mistake in commencing the action in his own name. So long as the doubt as to who should bring the action was bona fide, there could be no question as to the jurisdiction of the court."

That case seems to me to directly in point. In view of the statement made by counsel for the appellant as to what the defendant might be able to prove if the issues were between the St. Regis, Limited, and the defendant, I think that there should be a new trial of this case, but as, in my opinion, all questions which could be raised between the defendant and the St. Regis, Limited were raised and gone into on the trial between the plaintiff and the defendant, and as it might appear at the trial to be had between the St. Regis, Limited, and the defendant that no new questions had been raised and practically no new evidence had been adduced, I would leave it to the judge on the trial to be had between the St. Regis, Limited and the defendant to decide the question of costs of the former trial, of the new trial and of this appeal. The St. Regis, Limited, should therefore be added as a party plaintiff, and they should have the right to make such amendments to the pleadings as would be rendered necessary in consequence of their being added as party plaintiffs. The defendant will, of course, also have the right to amend his pleadings.

MANITOBA.

DECEMBER 11TH, 1914.

COURT OF APPEAL.

RE KILDONAN AND ST. ANDREW'S ELECTION.

GUNN ET AL. v. MONTAGUE.

Controverted Elections—4 Geo. V., ch. 25 (Man.)—Notice of Presentation of Petition—Order for Substitutional Service Before Expiration of Extended Time for Personal Service—Validity—Order for Substitutional Service Need Not Fix Time for Serving—Must be Served Within Reasonable Time.

An order for the substitutional service of a notice of presentation of a petition under the Manitoba Controverted Elections Act, may be made before the expiration of the period fixed for personal service where it is apparent that service cannot be effected within the said period.

An order for substitutional service of a notice of presentation of a petition under the Manitoba Controverted Elections Act which does not provide any time within which to effect service is valid if served within a reasonable time.

***McLeod* v. *Gibbon*, 35 N. B. R. 376, followed.**

An appeal from the judgment of PRENDERGAST, J. (29 W. L. R. 635).

The appeal was heard by RICHARDS, PERDUE, CAMERON and HAGGART, JJA.

J. E. Adamson, for petitioners.

A. J. Andrews, K.C., F. M. Burbidge and M. G. Macneil, for respondents.

The judgment of the court was delivered by

RICHARDS, J.A.:—The facts are stated in the reasons for judgment delivered by Mr. Justice Prendergast.

Though he dismisses the objection that neither the electoral division, nor the date of election, is stated in the style of cause, in the orders of the 7th and 18th August, because he considers the objection as in the nature of an appeal, we think that the other grounds stated by him meet and dispose of the point.

The second objection, which does not appear to have been raised before Mr. Justice Prendergast, as he has not referred to it, is that there was no power to make the order for substitutional service till after the expiry of the 18th, the last day of the time allowed by the order of the 7th for making personal service. It is founded on the initial words of sec. 23, sub-sec. (2) of the Act, which says:

"If service can not be effected on the respondent or respondents personally within the time granted by the judge, then substitutional service as directed by the judge shall be good service."

It is argued that it cannot be known till after the expiration of the extended time granted by the judge, that personal service cannot be effected within that period, and that, therefore, the order made before that time expired was made without jurisdiction.

It seems to us, however, that it may frequently be apparent before the expiry of the extended time that service cannot be made within that time, and that it in fact was so shewn in this case. The personal service indicated by the Act is required to be made within Manitoba. Here, there was before the judge on the 18th evidence that the respondent was out of this province, and that the state of his health would prevent his returning to Manitoba till after the 18th.

The point raised by the objection to the order of the 18th that it fixed no time within which the substitutional service was to be made, was dealt with by the Supreme Court of New Brunswick in McLeod v. Gibson, 35 N. B. 376, referred to by Mr. Justice Prendergast.

Five judges sat in the court that dealt with that case, and though only one, Mr. Justice Gregory, referred to the point, the others necessarily concurred in his view by dismissing the rule to set aside the order.

The provisions of the Dominion Act, under consideration in that case, were the same in effect as those of our sec. 23 and its subsection. It will be observed that sub-sec. (2) does not require the judge to limit the time. We think that, as stated by Mr. Justice Gregory, in the words quoted by Mr. Justice Prendergast, "that question would be subject to the opinion of the court or judge, as to the reasonable promptness with which the petitioner carried out his permission obtained."

In the present case, the petitioner made the substitutional serice on the next following day.

The appeals will be dismissed with costs in the cause to the petitioners.

Appeal dismissed.

ALBERTA.

DECEMBER 18TH, 1914.

SUPREME COURT—APPELLATE DIVISION.

VOYER v. LEPAGE.

Evidence—Corroboration—Executors and Administrators—Evidence Act, Sec. 12—Administratrix Claiming to be Beneficial Owner of Property in Deceased's Name—Claim Consisting of Several Items—Items Arising Out of Connected Transactions—Not Necessary to Corroborate Every Item.

In an action for administration and accounting, the principal defendant, the administratrix, contended that she was entitled in her own right to certain properties standing in the name of the deceased at the time of his death:—

Held, affirming the trial judgment, that in setting up this contention, the administratrix was in effect making a claim against the estate of deceased and that her evidence accordingly required corroboration under sec. 12 of the Evidence Act.

Held, that the admission by the plaintiff that the administratrix was the beneficial owner of one of the properties standing in the name of the deceased was corroborative of the statement of the administratrix that she was the beneficial owner of the other properties, it not being necessary for an interested party claiming against the estate of a deceased person to corroborate every item of the claim where the transactions upon which the items are based arose out of and formed part of a general business relation throughout the whole of which the deceased acted as the business agent and employee of the interested party.

Cook v. *Grant*, 32 U. C. C. P. 511, distinguished.

Per BECK, J.: — Where an interested party makes a claim against the estate of a deceased person arising out of several transactions and the evidence of the interested party, shewing an underlying connection between the said transactions, is corroborated with respect to some of them so as to satisfy the mind of the court not only of the truthfulness and correctness of his testimony with regard to the latter transactions but of his general credibility, his evidence is thereby corroborated as to the residue of the transactions.

An appeal from the judgment of STUART, J. (28 W. L. R. 394).

E. B. Edwards, K.C., for plaintiff, appellant.

J. Cormack, for defendant, respondent.

SIMMONS. J.:—Louis Lepage died in Edmonton, intestate, in the fall of 1910. He was unmarried at the time of his decease, and had lived for some years prior to his decease at a boarding house in Edmonton with his sister, Victoria Lepage, the defendant in this action, who paid his board and gave him $35 per month pursuant to an agreement made between them, which will be hereinafter referred to. At his death he was registered owner of a farm near Fort Saskatchewan, which was subject to a first mortgage to the Great West Life Assurance Company for $800 and subject to a second mortgage to the defendant, Victoria Lepage, for the sum of $4,500. He was also registered owner of 15 lots in a sub-division of the city of Edmonton, known as Inglewood; a half interest also in five city lots designated as the Dorval lots; and an unregistered transfer to himself of two city lots in the Hudson's Bay Reserve in the city of Edmonton. Ten of the Inglewood lots had been sold and paid for by the purchasers during his lifetime and are therefore not subject to the controversy which forms the subject of this action. The defendant, Victoria Lepage, was registered owner of considerable property in the city of Edmonton. The plaintiff, Martene Voyer, is a sister of the defendant and of the deceased. The defendants, Fortunal Lepage, Macaire Lepage and Napoleon Lepage were joined as defendants, as only next of kin, and are brothers and sister of the plaintiff and defendant, Victoria Lepage. Shortly after the death of Louis Lepage, the defendant, Victoria Lepage, obtained grant of letters of administration of his estate and then transferred to herself as beneficial owner the above-named properties which were in the name of her brother at his decease. The sum of $383.75 in the bank to the credit of the deceased was also claimed by Victoria Lepage as moneys belonging to her. In the inventory filed by her on application for the grant of administration, the property of the deceased was inventoried at $50 personal property.

The plaintiff's statement of claim alleges a partnership entered into by the deceased and Victoria Lepage for the purpose of carrying on business and acquiring lands and other property, and that pursuant to such partnership, Louis Lepage was in his lifetime jointly interested with the defendant in the lands hereinbefore referred to, and the defendant, Victoria Lepage, having dealt with the same as

her own property, and having sold and disposed of other lands to which the deceased was entitled, has wrongfully refused to account for the same as part of the estate of the deceased.

The plaintiff asks for a declaration that the defendant, Victoria Lepage, is a trustee for the estate of Louis Lepage for the said farm at Fort Saskatchewan free from the mortgage to her of $4,500, and that she is such trustee as to the half interest of the deceased in the remainder of the land. Three members of the family, Napoleon Lepage, Louis Lepage and Charles, came from their home in the Province of Quebec to Alberta about the year 1891 and settled in the vicinity of Fort Saskatchewan. In the same year the defendant, Victoria Lepage, joined them as she says at the request of Louis Lepage. She had been teaching school in the Province of Quebec for seventeen years on a very moderate salary, $200 per year, when she left Quebec Province. Immediately upon coming to Alberta she resumed her profession of teaching at a salary of about $600 per year and continued to teach until 1904 when she and Louis removed to Edmonton.

In regard to the farm which is described as the northeast quarter of section 36, township 55, range 22, west of the fourth meridian, the plaintiff claims that the mortgage of $4,500 does not represent moneys loaned by Victoria Lepage to the plaintiff, and suggests that the mortgage was executed for the protection of the property from any unwise disposal of the same by the deceased.

The evidence adduced by the plaintiff in support of a partnership is practically confined to the transactions between the deceased and Victoria Lepage in regard to the farm. In so far as the real estate transactions carried on in Edmonton subsequent to 1904 are concerned, the inference supporting a partnership is sought to be drawn from the transactions prior to that date and from the fact that part of this property was in the name of Louis Lepage at his decease.

Dealing first then with the farm, it appears that Louis Lepage had no property when his sister, Victoria Lepage, came to visit him in 1891. She says she decided to stay in Alberta and assist him to get established on a farm. He secured homestead entry for the above quarter section and

she says she lent him money to purchase stock and implements.

Napoleon Lepage, plaintiff's witness, a brother with whom Louis was living in 1891, says there was a partnership and she was to furnish the money, and that Victoria gave Louis money to get back to Quebec in the same year to see his parents, and that he, Napoleon himself, borrowed $300 from Victoria in 1901. This brother also says that Victoria furnished the money to clear the homestead and to purchase cattle and horses for the farm, and his only knowledge of the alleged partnership which he has is what is told him by his brother Louis and his sister Victoria in 1891.

It appears that subsequently a quarter section of land was purchased by Louis Lepage from the Canadian Pacific Railway and this witness cannot say who supplied the money, but the land was subsequently sold and does not concern this action. T. Lamoreaux, witness for the plaintiff, says Victoria Lepage bought cattle to put on the farm. Francis Fortin, a witness for the plaintiff says that Louis Lepage was an educated man and a good business man.

Upon the evidence and upon the inferences to be drawn from the actual business transactions between Louis Lepage and Victoria Lepage rests the plaintiff's claim.

In regard to the farming transactions, the documentary evidence is clearly corroborative of the defendant's claim that the mortgage represented actual advances made by her or at least that this was the lump sum which the parties mutually agreed should represent this indebtedness. H. H. Robertson, a solicitor practising in Edmonton, identified an agreement in writing made in 1895 and prepared by him then when he was a law student in S. S. Taylor's law office in Edmonton. He says that there was a dispute about the disbursements of some stock on the farm and the document represents the settlement. The document begins by reciting the indebtedness of $5,000 and a real estate mortgage on the farm of $5,000, and a chattel mortgage on the personal property for the same amount, dated April 22nd, 1895, and that the said mortgagee (Victoria Lepage) had entered into control and possession of all the said lands and chattels and is desirous of employing the mortgagor (Louis Lepage) to act as her servant in working and in using the land and property thus described, so as to make the same remunerative and so as by the profits to pay off said chattels and real

estate mortgages. The document then proceeded to recite that Louis Lepage will cultivate the said farm and look after the chattel for a salary of $35 per month. The agreement concludes with the covenant of Victoria Lepage to the effect that when by virtue of this arrangement the indebtedness is retired, she would discharge the said mortgage.

The parties were in a lawyer's office for the purpose of adjusting difficulties and an agreement is made presumably after they had stated exactly what the relations were which existed at that time, but no suggestion of a partnership occurs.

Subsequently Victoria Lepage wished to obtain an $800 loan on the security of the farm and it was arranged that the $5,000 mortgage should be discharged by Victoria Lepage and a first mortgage to the Great West Life Assurance for $800 was registered and then Louis Lepage executed a second mortgage to Victoria for $4,500. Just why it was not reduced to $4,200 does not clearly appear. A number of witnesses for the defence gave evidence of admissions made by Louis Lepage to the effect that he was in the employment of his sister at a salary of $35 per month and that he had transferred all his property to his sister Victoria Lepage and that she was supporting him. The deceased, it is admitted, was a shrewd man and well educated, but was addicted to drink and apparently relied upon his sister to care for him and provide a home for him. The learned trial judge accepted the explanation of the defendant as to the relations between her and her brother in regard to the various properties in question.

When they came to Edmonton in 1904, she alleges she embarked upon real estate speculations and her brother had a better knowledge of the English language than she had and was able to make sales more readily and expeditiously by having the agreements to purchase in his name. There is no suggestion in the mass of evidence upon record that Louis Lepage had any means to embark upon business of this kind. The learned trial judge took the view that notwithstanding the pleadings, this was a case where section 12 of the Evidence Act should be applied against the defendant and that in regard to the properties standing in the name of the deceased that she must supply corroboration of her claim to the whole beneficial interest in the same.

In regard to lots one to four in block nine, known as Dorval lots, Mr. Leclaire corroborated her statement that the purchase monies were supplied by her. The trial judge held that in the case of these lots, although the registered title was in the name of the deceased, yet the whole beneficial interest belonged to the defendant, that these circumstances might be treated as corroborative of the defendant's statement in regard to the other property. In Cook v. Grant, 32 U. C. C. P. p. 511, Osler, J., held that when each item of an account against the estate of a deceased person is an independent transaction and constitutes a separate independent cause of action, to satisfy the statute R. S. O. ch. 62, sec. 10, some essential corroboration of the interested party must be adduced to each item. Our sec. 12 is sec. 10 of the Ontario Act and I accept the judgment of Osler, J., as the correct principle in applying the statute. In the present case, however, the plaintiff had admitted in the claim that the defendant had a beneficial interest in the properties registered in the name of her deceased brother, but her claim rests upon the allegation that this was not the whole, but only a one-half interest.

The plaintiff says that the divided interest arose out of a partnership agreement. The defendant alleges that her beneficial interest was an entire interest and the title was in the name of her brother as an incident of the relation of principal and agent between herself and her brother.

The plaintiff failed to establish a partnership and if held strictly to the pleadings, her whole action necessarily fails.

But even if a wider issue is allowed the plaintiff, I am of the opinion she is bound by her admission that the defendant had at least a beneficial interest in these properties and that is corroborative of the defendant's version that each transaction was not an isolated one, but that each arose out of and formed a part of a general business relation throughout the whole of which her brother acted as her business agent and employee. In this view, then, each transaction should not be separated and, therefore, would not come within the rule enumerated by Osler, J., in Cook v. Grant. It might quite properly be said that if the plaintiff had based her claim upon the fact that these properties were in the name of the deceased and that prima facie he was the sole beneficial owner, that the defendant would be called upon to

substantiate her version of each transaction by corroborative testimony.

This was not, however, the case which the defendant was called upon to meet. At the argument upon the appeal counsel for the plaintiff announced that he withdrew the claim to an interest in the Dorval lots and lot 135 in block 9 of the Husdon Bay sub-division and consented that the farm should go to the defendant in satisfaction of her mortgage. While the statement of counsel removed these properties from the issue, the evidence at trial in regard to them is before us and has an important bearing on the issues in regard to the remaining property which was in the name of the deceased. I am glad to be able to come to the same conclusion as the trial judge that the defendant has satisfied the onus placed upon her in regard to the lands in question and although the summary method of obtaining title through the administration grant might seem open to criticism, her counsel assumed full responsibility for this, and stated it was done under his advice, and although in the result she acquired considerable property through the means of real estate speculating when the same was rife in Edmonton, she seems at all times from 1891 until the decease of her brother to have undertaken to hold up, care for and maintain an unfortunate brother who was, through the influence of drink, unable to look after himself, and that during the same period there is evidence which strongly suggests that the plaintiff in this action was only too willing to have that care shifted upon the defendant Victoria Lepage.

I would, therefore, dismiss the appeal, with costs.

BECK, J.:—My brother Simmons has set out the facts and I concur in his opinion and his disposition of the appeal, but I have thought it well to examine the Ontario decisions upon the provision of the Evidence Act with regard to corroboration as virtually the whole question before us depends upon the interpretation to be put upon that provision.

The statement of claim alleges that the deceased at the time of his death was the registered owner of four parcels of land. With some amendment of the description, this was proved and the four parcels were spoken of in the case as (1) the farm, (2) the Inglewood lots, (3) the Dorval lots, (4) the Hudson Bay lots.

As to the farm, the plaintiff alleged that a mortgage upon it for $4,500 from the deceased to the defendant was without consideration.

As to the three other properties, the plaintiff alleged that the defendant and the deceased had "entered into partnership" for the purpose of carrying on the business of acquiring lands and other property and that they were together entitled to these three properties "as such partners and as being jointly interested in the same."

As to the farm, the burden of shewing that the mortgage was without consideration was, of course, upon the plaintiff and obviously the provision of the Evidence Act had no application to that part of the case. The learned trial judge found in favour of the defendant and his judgment in that respect must stand.

As to the Dorval lots, there was evidence clearly and distinctly corroborating the defendant's claim—made with regard to all three parcels of land—that the deceased was merely a trustee for her of the entire estate in the lands. The trial judge believed the defendant and the witness who corroborated her with respect to this transaction and his finding must be accepted.

As to the other two parcels of land, namely, the Inglewood lots and the Hudson Bay lots, the trial judge finds no evidence, corroborative of the defendant referring directly and especially to the particular lands or to the transactions through which they were acquired.

He nevertheless holds that the evidence of the defendant was corroborated within the requirements of the Evidence Act and, in my opinion, he was right.

In Orr v. Orr (1874), 21 Grant R. 397, Draper, C.J., said: "In view of the effect of the statute enabling parties to give evidence on their own behalf, the Legislature have deemed it wise to make a positive enactment; while the decision in England" (Hill v. Wilson, L. R. 8, ch. 888) "enables this Court to see that such was already the law; and I think it should not be construed as introducing a new principle, but as declaratory of the common law. The Act, however, does not define what is to be considered a corroboration, except by the words 'material evidence,' that is, as I take it, material to the issue to be sustained by the party to be corroborated."

In McDonald v. McKinnon (1878), 26 Grant R. 12, it was held by Spragge, C.J., that the evidence of the party setting up a claim or seeking to establish a position against the estate of a deceased is not by the statute required to be corroborated in every particular; that it is sufficient if independent support is given to the party's statements in so many instances that it raises in the minds of the court the conviction that such statements may be depended upon even in respect of those matters in which there is otherwise no corroboration. He says: "With regard to corroborative evidence under the statute, I do not agree that the evidence of a party claiming must be corroborated in every particular. If it were so, it would be requiring the party to establish his whole case by independent evidence. The observation of Sir James Hannen, in the case of Lord St. Leonard's will—Sugden v. Lord St. Leonard's, 1 P. D. 179—are apposite to this point. "Let me observe, however, with regard to this corroborative evidence, it is not necessary that I should find corroboration in every particular, and to the full extent of what Miss Sugden has said, before I give credit to her statements. Because that would be, in other words, to say that I ought not to use any evidence standing in need of corroboration, unless there were proofs enabling me to dispense altogether with the evidence to be corroborated. It is sufficient if I find that independent support is given to Miss Sugden's statements in so many instances, that it raises in my mind the conviction that she is to be depended upon, even in those matters in which I do not find corroboration elsewhere."

In Parker v. Parker (1881), 32 U. C. C. P. 113, Armour, J., considered Orr v. Orr, and said of it: "If the learned Chief Justice . . . meant to say that the interested party must be corroborated as to every issue raised in the cause by some other evidence material to the issue, I think he was putting too narrow a construction upon the provision under discussion."

He quotes from McDonald v. McKinnon evidently with approval.

He also quotes the language of Sir James Hannen in Sugden v. Lord St. Leonard, and says: "Having pointed out, step by step, her statements, in which she was corroborated, and the corroboration of them, he points out, at p. 193, the statements in which she was not corroborated: and among

several unimportant ones, important statements as to the bequest of the residuary estate, in which, according to her statement, she was largely interested; and the devises of the estates in the event of the failure of the several limitations; and as to these statements, he found that she was to be relied upon."

He sums up his view in these words: "I think that, under the provision, if there is any evidence adduced corroborating the evidence of the interested party in support of his claim or defence in any material particular, it must be submitted to the jury as sufficient corroboration in point of law, the weight to be attached to it in point of fact being a matter for their consideration."

In Re Ross (1881), 29 Grant R. 385, Boyd, C.J., said: "The statute requires (what was before the statute the rule of the court) that as against the estate of a deceased person, no one should recover in respect of any matter occurring before the death of such person, unless his evidence is corroborated. It is urged that this account, consisting of twenty-nine items, is corroborated in two or three points by independent evidence. But this cannot be sufficient, where each item is or might be the matter of a separate and independent cause of action. Corroboration given to an agreement to repay a loan in one year, or of an agreement to pay interest on a certain sum of money cannot, by implication, substantiate an agreement to pay interest on a different sum of money lent in a letter or earlier year, or if an agreement to repay money advanced at another time. Each of such claims stands on its own merits, and some material corroboration as to each should be adduced to satisfy the statute. It would be of dangerous consequence to hold that a person could recover claims for goods supplied and moneys lent in large amounts against the estate of a deceased person, no matter how extended the dealings and however isolated from each other, by verifying something material to the maintenance of his claim as to one or two out of the list."

In Cook v. Grant (1882), 32 U. C. C. P. 511, Osler, J., refers to Orr v. Orr and Parker v. Parker with evident approval. He says: "When separate and independent matters, to use the term" (matter) "employed in the Act are embraced in the same action, I find no authority for the plaintiff's contention that it is only necessary that her evidence should be corroborated as to one only.

"I agree that it is not necessary that the interested party should be corroborated upon every issue raised in the cause on each separate matter, treating that expression as equivalent to claim or cause of action. . . . What is material evidence in corroboration of the evidence of the interested party as to one part of his claim may not be of the slightest importance as to another or of the least value in enabling a jury to determine whether his" (otherwise) "uncorroborated testimony ought to be credited.

"The Act, in my opinion, plainly requires that his evidence as to both" (parts) "should be corroborated in some particular. I do not understand that the rule has been differently laid down in any case decided under the Act."

Radford v. McDonald (1890), 19 O. A. R. 167, approved of Parker v. Parker, 32 U. C. C. P. 113.

Green v. McLeod (1896), 23 O. A. R. 676, holds that "some other material evidence" may either be direct or consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement. In that case, the defendant admitted that she had received the moneys sued for by way of cheque, but stated that she had so received them at the deceased's request as his messenger and had in due course paid them over to him. It was proved that for a number of years before the death of the deceased, the defendant—his sister-in-law—had been in the habit of getting money for the deceased on his cheques; that the deceased was a close, careful and intelligent man who lived for over a year after the transaction in question and during that time conversed with many persons and made no complaint of the non-receipt of these moneys. It was held that the defendant's evidence was sufficiently corroborated.

McDonald v. McDonald (1903), 33 S. C. R. 145, lays down the same principle. In that case, the facts and circumstances proved were held to result in such inferences as rendered it improbable that the facts sworn to by the claimant of a donatio mortis causa were not true and as reasonably tended to give certainty to the contention of their proof. Armour, J., who dissented, thought that the evidence did not go as far as that in Green v. McLeod.

I think that from these decisions, the rule may be laid down that while it is true that where there are in issue a number of properties, transactions or other items so distinct,

separate and independent, that they might form distinct, separate and independent causes of action, on the one side or the other, corroborative evidence directed specifically to each is prima facie essential to meet the requirements of the provision of the Evidence Act, yet where an underlying connection between several items is testified to by the interested party and his vidence is corroborated with respect to some of these items so as to satisfy the mind of the court, not only of the truthfulness and correctness of his testimony with regard to the latter items, but of his general credibility, his evidence is thereby corroborated as to the residue of the items.

This proposition is exemplified in the case of Sugden v. Lord St. Leonards, where the evidence of Miss Sugden, who was largely interested, was as to the contents of a lost will. She was admittedly honest in intention in giving her evidence. There was specific corroboration of her statements as to the contents of the will in many instances, but in some instances there was no specific corroboration; it was held that these circumstances constituted corroboration in regard to the latter instances.

It is also exemplified in Green v. McLeod, where the defendant had admittedly received two cheques from the deceased shortly before his death. Her answer to a claim for them was that she was a mere messenger for the deceased; that she had gone to the bank and got the cheque cashed; returned to the house and paid over the money to the deceased. The fact that she was shewn in many other instances to have acted as she said she acted in the particular instance in question was accepted as part of the corroborative evidence required, and she was found not liable.

This principle has its application in the present case. (1) There was a relationship between the deceased and the defendant with regard to the parcels of land in dispute; that that relationship was something different from what appeared on the face of the document was admitted by the plaintiff and this admission is, it seems to me, of extraordinary weight. The plaintiff, the deceased and the defendant—brothers and sisters—and other members of the family lived either in the same town (Edmonton) or within easy reach of each other for many years; visits between them were of frequent occurrence; the relationship—the conduct one towards the other—of the defendant and the deceased

was open to observation by the plaintiff and other members of the family through this long period of time and on the evidence thus gathered—evidence, much of which it would be impossible to present to the court—the plaintiff put forward a claim based, not upon the rights appearing on the face of the documents, but one contrary to them.

(2) What precisely that relationship was has been found by the trial judge in respect of one of three parcels of land to be that the deceased was a bare trustee for the defendant; and this finding was based on the testimony of the defendant corroborated in accordance with requirement of the Evidence Act.

(3) The learned trial judge expresses himself as being convinced of the honesty and substantial correctness of the defendant's evidence throughout.

Under these circumstances, without more—though I think there are a number of additional corroborative circumstances—the learned trial judge was, in my opinion, authorized as a matter of law to find as he did upon the facts, and if right in law, it is scarcely contended that his findings of fact can be disturbed.

SCOTT, J., concurred with SIMMONS, J.

Appeal dismissed.

THE

Western Law Reporter

VOL. XXX. TORONTO, MARCH 15, 1915. No. 12

MANITOBA.

GALT, J. FEBRUARY 11TH, 1915.

TRIAL.

REX v. RABINOVITCH AND CLINGMAN.

Criminal Law—Secret Commissions Act, 8-9 Edw. VII., ch. 33, sec. 3 (b), (c), (d)—Evidence—Accomplice—Corroboration.

A company had been purchasing second-hand empty boxes from defendant R., and later on from a partnership composed of defendants R. and C. Whenever the company required boxes it would notify its head packer who would order them and, upon receipt thereof, make out an order in duplicate, setting forth the date and fixing the charges for the consignment. A copy of the said order was kept and the original sent to defendants who rendered from time to time an account which was a reproduction of the prices fixed by the head packer in the orders made out by him. Upon presentation to the company of an account approved and initialled by the head packer, the defendants would receive a cheque.

Held, where the accounts delivered by defendants to the head packer embodied prices far in excess of the proper ones, that defendants, being well aware of the true value of the boxes, were guilty of making false and erroneous statements to an agent within the meaning of sec. 3 (c) of the Secret Commissions Act, although the accounts were merely a reproduction of the prices fixed by the said agent.

Held, where defendant R. accepted an order made out by the head packer and acted upon it knowingly and with intent to deceive the company, that he was guilty of an offence under sec. 3 (d) of the said Act.

Held, where defendant R. gave the said head packer various sums of money monthly as an inducement or reward for fixing prices higher than they should be fixed, that he was guilty of an offence under sec 3 (b) of the said Act.

Held, since the head packer had been convicted on a charge arising out of the transactions in question, that he was an accomplice, and that therefore his evidence against R. relating to the charge under sec. 3 (b) of the said Act needed corroboration.

Held, that facts which tend to render more probable the truth of a witness's testimony on any material point are admissible in corroboration thereof, although otherwise irrelevant to the issue,

and although happening before the date of the fact to be corroborated.

***Wilcox* v. *Gotfrey*, 26 L. T. N. S. 481, followed.**

***Green* v. *McLeod*, 3 A. R. 676, referred to.**

The prisoners were charged jointly with four offences under the Secret Commissions Act, 8-9 Edw. VII., ch. 33.

C. P. Fullerton, K.C., for Crown.

W. H. Hastings, for prisoners.

GALT, J.:—The title of the Act is: "An Act to prevent the payment or acceptance of illicit or secret commissions and other like practices." The word "agent" in the Act is defined to mean: "Any person employed by, or acting for, another, and includes a person serving under the Crown or under any municipal or other corporation." The word "principal" includes an employer.

Under section 3, "Every one is guilty of an offence and liable, upon conviction on indictment, to two years' imprisonment, or to a fine not exceeding two thousand five hundred dollars, or to both, and, upon summary conviction, to imprisonment for six months, with or without hard labour, or to a fine not exceeding one hundred dollars, or to both, who,—

"(b) corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward or consideration to such agent for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act relating to his principal's affairs or business, or for shewing or forbearing to shew favour or disfavour to any person with relation to his principal's affairs or business; or

"(c) knowingly gives to any agent, or, being an agent, knowingly uses with intent to deceive his principal, any receipt, account, or other document, in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which, to his knowledge, is intended to mislead the principal;

"(d) every person who is a party or knowingly privy to any offence under this Act shall be guilty of such offence and shall be liable upon conviction to the punishment hereinbefore provided for by this section."

Section 4 of the Act provides that it shall be read as if its provisions formed part of the Criminal Code.

The first count of the indictment charges that the accused about the 16th day of June, 1914, at the City of Winnipeg, knowingly gave to George Craig Lockhart or to Hugh S. McCook, both agents of the J. H. Ashdown Hardware Company, Limited, an account which contained a statement which was false and erroneous in a material particular and was intended to mislead the said company.

The second count charges that on or about June 18th, 1914, at Winnipeg aforesaid, the accused were knowingly privy to one Hugh S. McCook, an agent of the J. H. Ashdown Hardware Company, Limited, knowingly, using, with intent to deceive the said company, the principal of said McCook, a receipt or order form, being a document in respect of which said company was interested, which said receipt or order contained statements which were false and erroneous in a material particular, and which said receipt or order form was, with the knowledge of said McCook, intended to mislead said company.

The third count charges that the accused in the month of June, 1914, at Winnipeg, aforesaid, corruptly gave a gift or consideration to Hugh S. McCook, an agent of the J. H. Ashdown Hardware Company, Limited, as an inducement or reward or consideration to such agent for shewing favour to them, the said accused, with relation to the affairs or business of said J. H. Ashdown Hardware Company, Limited, or for having done an act relating to the affairs or business of said company.

The fourth count charges that the accused on or about the 13th July, 1914, at Winnipeg, aforesaid, knowingly gave to George Craig Lockhart, an agent of the J. H. Ashdown Hardware Company, Limited, an account in respect of which the said company, the principal of said Lockhart, was interested, which account contained a statement which was false and erroneous in a material particular and which, to the knowledge of the accused, was intended to mislead the said company.

The Ashdown Company are wholesale and retail merchants in Winnipeg, and have conducted business here for many years.

The present transaction occurred in their wholesale business. In re-shipping their goods, they require boxes of various sizes, and it has been their custom to purchase second-hand empty boxes from various persons and firms. These boxes,

for the most part, were obtained from wholesale liquor dealers and hotels, and also from wholesale tobacco dealers and grocery dealers; but far the larger proportion of the boxes required and supplied were so-called liquor boxes. The prices charged by the original vendors of these second-hand liquor boxes was shewn to be $1 per dozen, if the boxes were called for, or $1.25 if they were delivered to the purchaser. The usual price charged for other boxes, for instance, biscuit boxes, chocolate boxes, tobacco boxes, cigarette boxes, etc., was 25c. apiece. Occasionally the prices charged would be 35c., 40c., 45c., and even 50c. per box; but that appears to have been unusual, and probably only applied to large packing cases required at the time for some special purpose.

The Ashdown Company had dealt with Rabinovitch continuously since the year 1908. In supplying these boxes to the Ashdown Company, Rabinovitch, and later on both Rabinovitch and Clingman, would have to procure and pay for the boxes, and they would naturally expect to make a reasonable profit on each resale to the Ashdown Company.

Fred L. Chandler, manager of the Marshall Wells Co, was called as a witness for the Crown. He testified that his company did the same class of business as the Ashdown Company; that they purchased similar empty boxes from a junk dealer named Schragge, and that they paid $1 per dozen for liquor boxes, if called for, or $1.25 if delivered by Schragge.

The following figures illustrate the prices paid by the Ashdown Company during their earlier dealings with Rabinovitch:—

Aug. 24, 1908.	5½ doz. grocery boxes at 10c.	$6 60
Sept. 4, 1908.	32 boxes at 30c.	9 60
Sept. 16, 1908.	10 boxes at 30c.	3 00
	42 boxes at 10c.	4 20
Sept. 9, 1908.	5½ doz. boxes at 10c.	6 60
Sept. 23, 1908.	78 boxes at 10c.	7 80
Sept. 29, 1908.	39 cases at 10c.	3 90
	8 cases at 25c.	2 00
Oct. 9, 1908.	95 boxes at 10c.	9 50
Nov. 20, 1908.	12 boxes at 35c.	4 20
	15 boxes at 30c.	4 50
Feb. 26, 1909.	12 boxes at 45c.	5 40
	5 doz. boxes at 15c.	9 00
	3 doz. boxes at 10c.	3 60
	10 boxes at 40c.	4 00

Mar. 9, 1909.	281 boxes at 25c.	$70	25
	22 boxes at 40c.	8	80
	7 boxes at 50c.	3	50
	12 boxes at 30c.	3	60

So far as I could gather from the evidence, the prices at which these various kinds of second-hand boxes were obtainable from 1908 down to date have been practically the same, so far as the general trade in this class of goods was concerned.

In the fall of 1909, Rabinovitch took his brother-in-law Clingman into partnership with him and they thenceforward carried on business under the name of the Winnipeg Bottle & Metal Exchange. The declaration of partnership was registered on March 18th, 1910.

Rabinovitch, who was examined during the course of the trial, appears to be a shrewd young man, with ordinary education. Clingman appears to be a dull, uneducated man, older than Rabinovitch, and unable to either read or write. Still Clingman had been engaged in this junk business for some considerable time before he entered into partnership with his brother-in-law, and he was well aware of the ordinary prices at which the goods he dealt in were bought and sold. In fact, he was usually the purchaser of the goods before reselling to the Ashdown Company. From the date of their partnership, the accused had continuous dealings with the Ashdown Company in the supply of second-hand boxes.

The system adopted by the parties was as follows: The Ashdown Company had a head packer, named Hugh Smith McCook, who had been in their employ for the last ten years, assisted by several under-packers. Goods for shipment by the company were packed on the third floor of their warehouse. On the first floor, the Ashdown Company employed a receiver of goods, named Thorne. Whenever the company required boxes, they would notify the accused, and when a consignment of boxes arrived, Thorne would count them without specifying the particular kind and enter them in a book. But Clingman did not require nor receive any receipt. Thorne would then notify McCook, the head packer, who would send them down one of his assistants to get the boxes. The assistant would count them and enter the number of them on a slip of paper, take the boxes up in the elevator to McCook, and hand him the slip. It would then be McCook's

duty to make out an order in duplicate, setting forth the date and fixing the charges for the consignment, and send the original to the accused, keeping the carbon copy in an order book.

The accused would render a statement of their account against the Ashdown Company twice a month, usually about the middle and end of the month. This statement would be a reproduction of the figures which had been fixed by McCook in each of the orders aforesaid. The statement rendered in the middle of any month would usually contain the orders given during the last fortnight of the preceding month, and the statement rendered at the end of the month would include the orders for the first half of that month. Such statements would be taken by one of the accused to McCook at the Ashdown warehouse, to be approved and initialled. It would then be handed back, and on presentation at the office a cheque would be made out and delivered for the amount in favour of the Winnipeg Bottle & Metal Exchange.

In or about the month of May, 1914, the Ashdown Company became suspicious that they were paying too much for their boxes. The fixing of the prices for these boxes had been delegated to McCook for years past and nobody else in the warehouse seemed to have any accurate knowledge as to what the proper prices should be.

The account referred to in the first count of the indictment is dated June 16th, 1914. It was made out by Harry Rabinovitch and consists of items which had previously been entered in various orders given by McCook to Rabinovitch, commencing June 2nd and ending June 15th. A glance at this account indicates at once a very large increase in the prices paid for boxes over the amounts which had previously been charged by Rabinovitch in 1908, and which were shewn, by the evidence of several witnesses, to be the ordinary prices for such goods in Winnipeg ever since that date. A few lots were charged for at the rate of 15 cents apiece, but a large number at prices ranging from 50 cents up to 80 cents.

In the result 490 second-hand boxes were received by the Ashdown Company from the accused and were charged for at an average price of 57 cents apiece. Clingman, who had delivered the boxes, took this account, amounting in all to $280 to the Ashdown Company, procured McCook's initialling, and then received a cheque for the amount.

The next account rendered by the accused under the name of the Winnipeg Bottle & Metal Exchange, is dated July 13th. It covers items running from June 17th to June 30th, amounting to $264, and forms the basis of the fourth count of the indictment. This account also was made out by Rabinovitch. The amounts charged for the various classes of boxes is pretty much the same as appeared in the previous account, that is to say, it varies from 15 cents apiece per box (in very few instances) to 40 cents, 50 cents, 60 cents and 80 cents. The boxes on the average netting 47½ cents apiece. Of these 556 boxes, 437 are said to have been liquor boxes, the price of which was shewn to be certainly not more than $1.50 per dozen.

Clingman, according to his own story, was absolutely ignorant of everything that took place in connection with these transactions. He says he could not read and did not know the prices that were being charged, and although he was entitled to one half the profits of the business, ever since the partnership commenced, he never made any effort to ascertain what was due to him, but merely drew out a little money from time to time to live upon. He must have had some practical knowledge of figures for he was the partner who conducted most of the buying up of boxes, etc. He also did most of the delivering of the goods, and he at least occasionally collected payment for the goods. I cannot believe that he was not well aware of the prices his firm was charging the Ashdown Company for the boxes in question. The line of business pursued by his firm included only a few classes of goods and it is impossible to believe that he did not frequently discuss with his brother-in-law, Rabinovitch, the prices at which they were selling the goods which he, Clingman, had already bought and paid for. In the case of the account dated June 16th, Clingman himself attended with the account, and got the cheque. He would at least know that his firm were collecting a cheque for $280 for boxes delivered between the 1st and 15th of June. He also knew the amount shewn by his firm's account dated July 13th, 1914, for $264, as he attended to collect this also.

I am satisfied that if there was any "false or erroneous statement" in either of these accounts Clingman as well as Rabinovitch must be taken to have known it.

The Secret Commissions Act is a reproduction of the Prevention of Corruption Act, 1906, in force in England.

I have been unable to find any case decided under either Act which might assist in deciding this case.

The first and fourth counts of the indictment are laid under sec. 3 (c) of the Secret Commissions Act, which is aimed at punishing anyone who knowingly gives to any agent any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal.

The question is, do these accounts, or either of them, contain any false or erroneous statement?

The Oxford New English Dictionary defines the word "false" to mean, "erroneous, wrong,"—"purposely untrue, mendacious."

During the argument of this case I was a good deal impressed with the view that a statement of account by a vendor of goods, embodying merely the same figures as had been fixed by an agent of the purchaser could not fairly be said to be a false statement, and that for the same reason it would not be erroneous or defective.

In order to properly ascertain to what, if any, extent the accused's accounts were false, in the light of the meaning given to that word by our most authoritative dictionary, it is necessary to revert to the original orders given by McCook which formed the basis of the accused's accounts.

McCook was well aware of the true values of the boxes and the prices which had for years been paid by the Ashdown Company in purchasing them. Upon receipt of any given quantity of boxes, for instance, of 83 boxes on June 4th, it was shewn in evidence that this consignment consisted of 80 liquor boxes and 3 Apollinaris boxes, valued in all at $8.30; but McCook subdivides these into five different classes of boxes at prices ranging from 15 cents to 80 cents per box, at a total charge of $32.10. Manifestly the statements made in that order as drawn up by McCook were false and erroneous within the meaning to be attributed to those terms, and were intended to deceive his principal.

Rabinovitch possessed the same knowledge as McCook had with regard to the proper values to be paid for the boxes. He must have known perfectly well that the prices were "false and erroneous." He willingly adopted McCook's

figures and rendered his account to the J. H. Ashdown Hardware Company, Limited, embodying these false charges, and sent Clingman to collect the money.

Clingman was well acquainted with the prices of the boxes, for he had paid for them himself. It is true he says he cannot read or write, but he at least knew the number of boxes he had delivered and he must have known the proper prices chargeable for them by his firm. He took the bill to McCook for initialling and subsequently obtained a cheque for the amount. I think he must be taken to have known perfectly well that the account contained the above false statements.

Precisely the same reasoning applies to the account dated July 13th, 1914, which forms the subject of the fourth count of the indictment.

The charge set forth in the second count of the indictment is that the accused on or about the 18th day of June, 1914, were knowingly privy to McCook, agent of the Ashdown Company, knowingly using, with intent to deceive the Ashdown Company, a receipt or order form No. 46173, which said receipt or order contained statements which were false and erroneous in a material particular, etc.

The order in question relates to a delivery of 191 boxes by the accused to the Ashdown Company. This delivery, as shewn by the evidence of George Craig Lockhart, voucher clerk for the Ashdown Company, consisted of 188 liquor cases and 4 Old Chum cases. The value of the liquor cases at proper prices is calculated to be $19.58, and the 4 Old Chum cases, $1, making in all $20.58. This consignment was expanded by McCook on the company's order form into seven different classes of boxes, ranging at prices of 15 cents, 40 cents, 45 cents, 50 cents, 60 cents, 65 cents and 80 cents, and the amount to be charged was fixed by McCook at $99.20.

Unquestionably this order contained statements which were false and erroneous in material particulars, and was intended to mislead the Ashdown Company.

Rabinovitch, for reasons already given, must be taken to have accepted the order and acted upon it knowingly and with intent to deceive the Ashdown Company.

There was no evidence to connect Clingman with knowledge of the terms of this order. He could not read or write

except to a very limited extent, and he would have nothing to do with the preparation of the accounts to be rendered to the Ashdown Company.

The third count of the indictment charges that the accused in the month of June, 1914, corruptly gave a gift or consideration to Hugh S. McCook, an agent of the J. H. Ashdown Hardware Company, Limited, as an inducement or reward or consideration to such agent for shewing favour to them with relation to the affairs or business of the Ashdown Company.

In order to deal intelligently with this charge a few preliminary observations are necessary. Shortly after July 1914, McCook was arrested in connection with the transactions in question. He pleaded guilty and was let out of custody on suspended sentence. The particular charge laid against him was not put in evidence at this trial, but McCook was called as a witness for the prosecution and testified that he had been in the employ of the Ashdown Company for about ten years as head packer. He explained the system adopted in purchasing second-hand boxes as above detailed. He had been purchasing boxes from Rabinovitch for about seven years and from both of the accused since the formation of the Winnipeg Bottle & Metal Exchange. McCook states that about three years ago Rabinovitch was with him in the warehouse and when going away put a ten dollar bill in McCook's pocket. McCook had been examined as a witness at the preliminary hearing and stated that Rabinovitch handed him $10 on the occasion in question, but he did not say that Rabinovitch had put it in the witness' pocket. McCook professes that at first he did not know why Rabinovitch gave him this money and he called him back to ask him about it, but Rabinovitch just told him to keep it, or something of that kind. A few months afterwards McCook says Rabinovitch gave him $20 and from that time on up to the date of McCook's discharge by the company on July 10th, 1914, Rabinovitch paid him moneys aggregating about $50 a month. McCook stated in his evidence that Rabinovitch asked him a couple of times "to put more on," in reference to the amounts to be inserted by McCook in his orders which would form the basis of the accounts subsequently to be rendered by the accused to the company.

The particular payment charged in the indictment is said to have been made by the accused to McCook in June, 1914.

McCook says that these payments were usually made to him by Rabinovitch on Portage avenue or at the Queen's Hotel. He says that Rabinovitch paid him $30 or $40 in June, 1914; but that he cannot recall whether it was paid to him on the street or in the Queen's Hotel, nor is he able to fix the date of the payment other than stating that he thinks it was during the latter part of June.

There is no evidence to connect Clingman with any of these alleged payments other than the suggestion that as a partner of Rabinovitch he must have known whatever Rabinovitch was doing in reference to the firm's business.

Rabinovitch denies that he ever paid anything to McCook in connection with his dealings. He shews by his evidence that he was away from Winnipeg from June 16th to 19th, and that he went away again on June 25th to the Pacific coast and was away till July 6th. Still, he was in Winnipeg from the 19th to the 25th. He did not deny McCook's statement that he had asked McCook "to put more on" the box account, but this may have been because he was not asked about it by his counsel.

In attempting to decide between the evidence given by these two men the credibility to be given to McCook is of course greatly weakened by the fact that he is a confessed criminal, and has been carrying on a systematic robbery of his employer for some years. Furthermore, his statements in regard to the particular instances of receiving money from Rabinovitch are indefinite. At the police court he stated that the first $10 was simply given to him by Rabinovitch, whereas at this trial he stated that the money was placed in his pocket by Rabinovitch. Then again as to the alleged payment in June, 1914, McCook stated at the police court that the amount was $40, whereas at this trial he said $30. On the other hand, one is confronted with the question, what possible motive could McCook have had for overcharging his employer, unless he derived some benefit from it?

There is no doubt whatever that the prices fixed by McCook to be charged by the accused for the boxes delivered to the Ashdown Company were frequently double and treble and quadruple the amounts which the accused were properly entitled to charge. The moneys payable for the boxes did not go through McCook's hands in the shape of cash, but were all paid by cheque delivered at the office to one of the accused.

That McCook should have carried on such a system of overcharges without receiving any benefit from the accused is impossible to believe. He was apparently the only employee of the Ashdown Company who had any accurate knowledge of the proper prices to be paid for these boxes, but he took the precaution of keeping his order books locked up in a drawer of his desk, so that nobody else could get at them until on one or two occasions in June, Mr. Dykes, the manager of the company, pried open the drawer and discovered the overcharges which were being made. McCook's evidence in this case must be treated, I think, as the evidence of an accomplice in the crime charged, and it should not be accepted without corroboration. But Rabinovitch knew just as well as McCook did that the figures fixed by McCook were gross overcharges, and that Rabinovitch and his partner were receiving the benefit of such overcharges. Rabinovitch himself made out the accounts under which he knew he was charging double and treble the right amounts. If he, as an honest man, considered that the figures were wrong and that gross mistakes were being made month by month in his favour by McCook, surely it would have been his duty to point them out to McCook: but no such thing happened.

I cannot resist the belief that McCook's evidence as to receiving these gifts month by month from Rabinovitch and in particular receiving $30 or $40 from Rabinovitch in the month of June, 1914, is reasonable in itself. I do not attach much importance to a lack of definiteness in the particulars of time, place or amount, because I think that if such gifts were made frequently the parties would not make a careful note of them even in their own minds.

The question is whether McCook's evidence is sufficiently corroborated. The following facts appear to me to have an important bearing on this question of corroboration.

Item 1. The statement of account rendered by the accused under the name of the Winnipeg Bottle & Metal Exchange is dated June 16th, 1914. Amongst the items included in it is one of June 3rd. Upon that date, a delivery was made by the accused, which is entered in the book of the receiver for the Ashdown Company as simply "103 empty boxes." It was shewn in evidence that Clingman nearly always made these deliveries and that he neither required nor received any receipt for the boxes he delivered. When

these boxes were sent upstairs to McCook, he expanded them as follows:—

28 boxes at 50c.	$14 00
31 boxes at 60c.	18 60
22 boxes at 45c.	9 90
15 boxes at 40c.	6 00
7 boxes at 15c.	1 05

On June 4th, another delivery of "83 empty boxes" was expanded by McCook as follows:—

22 boxes at 60c.	$13 20
14 boxes at 50c.	7 00
31 boxes at 15c.	4 65
13 boxes at 45c.	5 85
3 boxes at 80c.	2 40

The total number of boxes delivered as shewn by the statement of June 16th is 490, and the amount charged is $280, or at an average price of 57 cents apiece.

Item 2. The statement of account rendered by the accused and dated July 13th was also made up by Rabinovitch. The item dated June 17th is entered in the receiver's book as simply "192 empty boxes." McCook expands this in his order book as follows:—

28 boxes at 15c.	$4 20
42 boxes at 60c.	25 20
34 boxes at 80c.	27 20
22 boxes at 65c.	14 30
18 boxes at 50c.	9 00
10 boxes at 45c.	4 50
37 boxes at 40c.	14 80

Item 3. The account dated June 16th was given by Rabinovitch to Clingman, who attended the Ashdown Company and received a cheque for the amount.

Item 4. As regards the account dated July 13th, McCook had been discharged on July 10th, so that he could not initial it. By this time, the Ashdown Company had decided not to pay any more moneys to the accused until they made further investigation. Consequently, when Rabinovitch rang up Lockhart on July 15th, inquiring why the account was not

paid, Lockhart requested him to furnish a duplicate of his account, and says that Rabinovitch promised to do so; but he never did so; and the accused have never since made any attempt to collect the money.

Item 5. The accused have never rendered any account for boxes delivered during the first half of July, although several such deliveries took place.

Facts which tend to render more probable the truth of a witness's testimony on any material point are admissible in corroboration thereof, although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated: Wilcox v. Gotfrey, 26 L. T. N. S. 481.

In Green v. McLeod, 23 A. R. 676, the question arose as to whether certain evidence given by an administratrix had been sufficiently corroborated. Osler, J.A., says, at p. 678: "In my opinion, it has been so corroborated. The language of the Act is very general. 'Other material evidence' is the expression, and this may be direct or may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement. . . . And as to the other sum received by her —indeed as to both—the fact of the deceased having survived her receipt of it for some fourteen months and having made no complaint of the defendant's conduct in connection with it, though he had ample opportunity of doing so, tells in her favour with equal force. These are circumstances which are material and which are relevant and which could not have been rejected. I think they amount to material evidence in corroboration of the defendant's evidence within the meaning of the Act."

I am of opinion that the facts set forth in the various items of evidence above mentioned, and the inferences or probabilities fairly deducible therefrom, afford sufficient corroboration of the evidence given by McCook as to the payments received by him from Rabinovitch from time to time. and in partcular to the payment of $30 or $40 in June, 1914.

With regard to Clingman, while I have the gravest doubt that he was not well aware of these payments alleged by McCook, I cannot say that the evidence is sufficient to connect him with knowledge of them. He was unable to read or write and McCook does not in any way connect Clingman with any of the payments. I accordingly give him the benefit of the doubt as regards this third count.

For the above reasons, I find Rabinovitch guilty upon all four counts and Clingman guilty upon the first and fourth counts, but not guilty on the scond and third.

MANITOBA.

MATHERS, C.J.K.B. FEBRUARY 13TH, 1915.

IN RE KILDONAN AND ST. ANDREW'S ELECTION.

Controverted Elections—Manitoba Act, Sec. 21—Publication of Notice of Presentation of Petition—Not Conditional Upon Receipt of Cost Thereof—Deposit Not Necessary Until Amount Ascertained and Petitioner Notified—Rule 10 Repealed by Sec. 21 of Act.

The language of sec. 21 of the Manitoba Controverted Elections Act is imperative, casting upon the returning officer the duty of publishing notice of presentation of a petition and is not conditional upon the petitioner supplying him with funds for that purpose.

The petitioner need not deposit money with the prothonotary or with the returning officer to cover the cost of publication of the notice of presentation of a petition until that amount has been ascertained by the returning officer and the petitioner is notified of it.

***In Re Lisgar*, 7 M. R. 581, 20 S. C. R. 1, inapplicable.**

Rule 10 is inconsistent with, and therefore impliedly repealed by, sec. 21 of the said Act.

Hearing of preliminary objections.

J. E. Adamson and S. Hart Green, for petitioners.

A. J. Andrews, K.C., and F. M. Burbidge, for respondents.

MATHERS, C.J.K.B.:—At the conclusion of the argument all the objections were dismissed with the exception of the 25th, which, in part, complains that the petitioners did not deposit with the prothonotary or pay to the returning officer the costs and expenses of publishing the petition and notice of presentation thereof, and that neither the petition nor notice of presentation thereof was published.

As a fact no money was deposited by the petitioners with the prothonotary or paid to the returning officer to cover the cost of publishing the notice which he is required to publish by section 21 of the Manitoba Controverted Elections Act, nor was any such notice published by him.

In so far as failure to publish this notice was due to the fault of the returning officer, the petitioners are not responsible. That officer was called and frankly stated that he did not know of the provision requiring him to publish a notice and that had he known he would in all probability have published the notice as required.

Rules of Court were made by the Judges in 1886 (8 M. R. 609) under a former Act. I am disposed to think these rules, in so far as they are not inconsistent with the present Act, are continued in force by section 33 of the Interpretation Act, R. S. M. 1913, c. 105, which says that when an Act is repealed and other provisions are substituted, all rules made under the repealed Act shall continue good and valid so far as they are not inconsistent with the substituted Act until they are annulled and others made in their stead. It is not necessary to decide the point because if the local rules are in force the notices required to be published by Rule 10 have been so published. I am of opinion, however, that, for the reasons given In Re Richelieu, 48 S. C. R. 625, this particular rule is inconsistent with, and therefore impliedly repealed by section 21 of the Act, which requires the returning officer to publish a notice of the petition in a newspaper published in the electoral division and if none so published, then in one published in an adjoining division.

Then, are the English rules of Michaelmas Term, 1868, in force? By section 90 of the Act, so far as the Manitoba rules "do not extend" the English rules are to be observed where, consistently with the Act, they can be observed. The local rules do not deal wth the question of who shall pay the cost of publishing the notice required by section 21 of the Act, and neither does the Act itself. It is to my mind at least doubtful whether the first part of English Rule 12 is not inconsistent with sec. 21 of the Act and is, therefore, not to be observed in Manitoba. It may be, however, that that rule, in so far as it directs that the cost of such publication shall be paid by the petitioners, is in force.

Assuming that this part of the rule is to be observed here, is the failure to deposit with the prothonotary a sum to cover this expenditure or to pay such a sum in advance to the returning officer, a fatal preliminary objection? It was held by the Manitoba Full Court, In re Lisgar, 7 M. R. 581, affirmed by the Supreme Court, 20 S. C. R. 1, and reaffirmed In re Burrard, 31 S. C. R. 459, that failure to leave

with the prothonotary at the time of filing the petition a copy thereof for the returning officer as required by English Rule 1, is a ground of preliminary objection and is fatal to the petition.

In the Lisgar case the Supreme Court was not unanimous. Strong and Gwynne, JJ., dissented, and Taschereau, J., doubted. From the judgment of Gwynne, J., in the Burrard case, I infer that had the court not felt itself bound by the judgment in the Lisgar case it would not have held the objection fatal to the petition.

If the matter were res integra I should have thought that such an objection was not a "ground of insufficiency" against the petition or the petitioner or against any further proceedings thereon" and was therefore not the subject of a preliminary objection at all. While the above decisions are binding and must be followed in all cases covered by them, it is manifest from the reluctance with which the Supreme Court decided the Burrard case that the rule established by them is not to be extended.

The English Rule One, which requires a copy of the petition to be left with the prothonotary, says nothing about leaving anything else. It does not, nor does any other rule, say that the petitioner shall also deposit with the prothonotary the cost of publishing the notice required by sec. 21. The last paragraph of Rule 12 does say that the cost of publication by the returning officer shall be paid by the petitioners. Had it been intended that the petitioners should make a deposit with the prothonotary to cover this expenditure, I have no doubt it would have said so. It does not say so, for the reason probably that until the notice is published, the amount to be paid therefor by the petitioners cannot be ascertained. When it is ascertained, the returning officer has a right to claim payment from the petitioners, or it may be that, having ascertained the amount to be paid, he could demand payment before publishing it. Until payment has been demanded and refused the petitioners are not in default.

It is possible that, should the petitioners refuse to pay the cost of publication when properly demanded, further proceedings upon the petition might be stayed upon an application for that purpose until he had done so. I am not, however, at present concerned with the returning officer's

remedy to recover payment in the event of the petitioner refusing or neglecting to pay him. The statute casts upon him the duty of publishing the notice required by section 21. Its language is imperative and is not conditional upon the petitioner supplying him with funds for that purpose. For his failure to do what the statute says he shall do, the petitioners are not responsible. Neither are they required to either deposit money with the prothonotary or with the returning officer to cover the cost of publication of the notice until that amount has been ascertained by the returning officer and they are notified of it. In my opinion, the 25th objection also fails.

There will be an order dismissing all the preliminary objections with costs.

MANITOBA.

MATHERS, C.J.K.B. FEBRUARY 13TH, 1915.

TRIAL.

KILDONAN INVESTMENT CO. v. THOMPSON.

Vendor and Purchaser—Agreement for Sale of Land—Several Purchasers Forming Syndicate—Principal and Agent—Implied Agency—Fraud and Misrepresentation by Sub-agent in Course of Employment—Sub-agent Also a Co-purchaser—Agency Unknown to Other Purchasers—Rescission—Refusal of Sub-agent to Assent to—Agreement Not Severable—Sub-agent Before Court—Exception to Rule Relating to Rescission of Joint Agreements.

A sub-agent may render the ultimate principal liable if the proved circumstances of the case are such that the ultimate principal and the intermediate agent must be deemed to have intended and agreed that the latter should, or might, appoint a substitute for the purpose of discharging in his stead and on behalf of the former duties including or involving the making of representations for the purpose of carrying out the business of the principal.

A principal, having entrusted an agent with the conduct of his business, is responsible for whatever wrong the agent commits in the course of the employment.

Barwick v. *Eng. Joint Stock Co.*, L. R. 2 Eq. 259; *Lloyd* v. *Grace*, [1912] A. C. 716: referred to.

Where several purchasers were induced by the misrepresentations of their co-purchaser, who, unknown to the said purchasers, was also the vendor's agent, to enter into an agreement to purchase land, it was *held*, that the refusal of the said co-purchaser and agent who committed the fraud to assent to the rescission of the

agreement was no reason for denial of that relief since the fact that said co-purchaser and agent was before the court took the case out of the general rule that where several persons have been induced by fraud to become joint purchasers, rescission cannot be decreed unless all assent to put an end to the agreement.

***Morrison* v. *Earls* (1884), 5 O. R. 434; *Braun* v. *Hughes* (1885), 3 M. R. 177: distinguished.**

An action brought by the Kildonan Investment Company against ten defendants for $837 interest due under an agreement to purchase by the defendants from the plaintiffs 74 lots in a subdivision of parish lots 63 and 64 of the parish of Kildonan for the sum of $18,600, of which $4,650 has been paid. Counterclaim for rescission and return of amount paid under agreement.

R. B. Graham and H. B. Hannesson, for plaintiffs.

C. P. Fullerton, K.C., and J. P. Foley, K.C., for defendants.

MATHERS, C.J.K.B.:—The defendants, other than the defendant W. J. Batters, allege that they were induced to enter into the said agreement by the fraud of the said Batters and one Baldwin, therein acting as the agents of the plaintiff, and they counterclaim against the plaintiffs and the defendant Batters for rescission of the agreement and for the repayment to them of the sum of $4,650 paid upon it.

The fraud alleged is that it was represented to said defendants by Batters and Baldwin that the land they were asked to purchase was situated close to the River Road on which the street car line is situate: that a $4,000 house was being erected across the street from it: that the owner was in financial difficulties and forced to sell at a price considerably below its value and that it could be purchased at such price only for a period of ten days.

The facts, as I find them, are as follows:

The plaintiff company was the owner, subject to a certain mortgage, of that portion of parish lots 63 and 64 Kildonan extending from the River Road to the Canadian Pacific Railway tracks, a distance, roughly speaking, of a mile and an eighth. The land described in the agreement of sale consists of all block 6 and 28 lots of block 9, the latter block lying immediately to the eastward of block 6. The most westerly end of block 6 is upwards of 2,700 feet, or something more than half a mile, from the River Road, and the eastern end of the property described in the agreement is upwards of 4,600 feet from the said River Road.

The selling agents appointed by the plaintiffs to dispose of the lots in this subdivision were Messrs. Skuli, Hansson & Co., estate agents in this city, and Mr. Hansson, the principal member of this firm, was the secretary treasurer of the plaintiff company. Hansson & Co. employed one Baldwin to dispose of blocks 6 and 9. Baldwin had acted as selling agent for Hansson & Co. for some time and had desk room in Hansson's office. He knew that there were a number of well-to-do farmers in the Holland district, and he selected that village as a likely point at which to form a syndicate of farmers for the purpose of purchasing these two blocks.

At this time the defendant Batters was carrying on business in the village of Holland as an implement agent and as a purchaser of farm stock. He had resided and carried on business there for upwards of fifteen years and was well and favorably known to the other defendants, all of whom are farmers residing in the Holland district, and with all of whom he had had large business transactions. Baldwin entered into an arrangement with Batters to assist him in forming the proposed syndicate for half the commission to be thereby earned, being actuated no doubt by the fact that Batters was well and favourably known to the farmers of the district and was a man in whose integrity and judgment they had a high degree of confidence. This was in or about the month of August or September, 1913.

Batters at once commenced negotiations with the other defendants individually. The scheme as arranged by himself and Baldwin was that the whole of blocks 6 and 9 should be sold at a price of $23,000; that the purchase price should be divided into ten equal portions, and that ten men should be procured to form the proposed syndicate, each taking one share. The ten men were procured, but Batters and three others, only agreed to take a half share each. The price was thereupon fixed at $18,600 for the whole of block 6 and 28 lots out of block 9.

The defendants were interviewed separately, sometimes by Batters alone and sometimes when accompanied by Baldwin. It was represented to them that the land was close to the Kildonan road on which the street car line ran—not that it adjoined the road, but that it commenced at a point at the farthest not more than 465 feet from the road: (Batters admits that he told one defendant the distance was not greater than that between his office and the elevator, admit-

ted to be about 465 feet); that a $4,000 dwelling house was about to be erected across the street from the property and that the selling price was $10 per foot; that the land was well worth $15 per foot, and that lands much farther out were selling at that price; that the owner was in financial difficulties and therefore was willing to accept $10 per foot, which was much below its actual value. Batters also represented to each of the defendants individually that he was going to take two shares himself and that the land was such an excellent bargain that he would take it all himself if he were able to finance it. He also represented to each of the defendants individually that he had selected him because of their past business relations and that this being a particularly good thing, he wanted to confer a favour by letting the defendant take a share.

Some of the defendants were shewn by Baldwin and Batters what purported to be the property; but in no case were they shewn its true location.

The defendants did not come together to conclude the agreement, but each signed it as it was presented to him for that purpose by Batters, and at the same time his share of the first instalment of purchase money was paid. Some of the cheques given in payment were made payable to Baldwin, but in the majority of cases they were delivered to Batters but were made payable to Hansson & Co. Each of the counterclaiming defendants paid his allotted share of the first instalment in full. Batters, on the other hand, paid no money for the half share allotted to him. His proportion of the first payment was charged by the vendors against the commission he had earned in bringing about the sale. Whether or not he is liable for any of the subsequent instalments does not appear. It is quite clear, however, that up to the present time he has only invested his services in procuring the agreement to be signed by his co-defendants.

I find that Batters did not know on the ground exactly where the property was; but that he represented that it was close to the River Road and at the very most not more than 465 feet distant therefrom, without believing that statement to be true and reckless whether it was true or false. I find that such representation was untrue and that the nearest point to the River Road was 2,700 feet. I find that the statement that a $4,000 house was being erected across the road was entirely untrue. I find that there was no truth in the

statement that the owner of the land was in financial difficulties and was for that reason forced to sell. I find that Batters concealed from the other defendants the fact that he was acting for the vendors for a commission and that he did so intending to deceive them into the belief that he was in all respects in the same situation as each of the defendants was. I find that the other defendants would not have entered into the agreement at all had they known the petition which Batters occupied.

The fact that Batters was acting for the vendors for the purpose of earning a commission upon the sale of the property was not pleaded, but an application was made to add this to the defence and counterclaim at the trial. I reserved judgment on the application and permitted the evidence to be given, and I now permit the amendment to be made.

I find that the defendants other than Batters were induced by the above-mentioned representations to enter into the contract sued upon and that they did so without knowledge that the representations were untrue.

It is first objected that Batters was the agent of Baldwin and was not the agent of the plaintiffs and, therefore, that the plaintiffs are not responsible for any representations that he might make. I infer that it was intended and agreed by the plaintiffs that Hansson & Co. should appoint subagents or substitutes for the purpose of disposing of this land on behalf of the plaintiffs. Hansson & Co. employed Baldwin and I infer that it was contemplated by them that Baldwin should employ assistants. That Batters was endeavouring to sell the property in question to his co-defendants was well known to Hansson and the latter recognized Batters as his agent for that purpose. When the agreement was signed Batters was not required by the plaintiffs to pay any part of the cash payment, but was given credit thereon for his share of the commission allowed upon the sale. A privity was thus established between the company and Batters.

The rule of law applicable is thus laid down in 20 Halsbury, at p. 710. "A sub-agent may render the ultimate principal liable if the proved circumstances of the case are such that the ultimate principal and the intermediate agent must be deemed to have intended and agreed that the latter should, or might, appoint a substitute for the purpose of discharging in his stead and on behalf of the former duties

including or involving the making of representations of the character of that sued upon." That statement is fully borne out by the language of the Court of Appeal in DeBussche v. Alt, 8 Ch. D. at 310, and in Powell v. Evan Jones, [1905] 1 K. B. at 11.

In my opinion, therefore, the facts in this case establish a privity between the plaintiff and Batters and render them responsible for whatever fraud or misrepresentations Batters committed in carrying out the business of the plaintiffs. Indeed the case does not need to rest on implied agency alone. There is evidence which would justify a finding that Batters' appointment as agent was expressly recognized by Hansson & Co. and the plaintiffs.

It is not necessary to find that the plaintiffs authorized Batters to make the false representations which he did make. Employers do not as a rule authorize their agents or servants to commit frauds, but, having entrusted the agent with the conduct of the business, the employer is responsible for whatever wrong his agent commits in the course of the employment: Barwick v. Eng. Joint Stock Co., L. R. 2 Eq. 259; Lloyd v. Grace, [1912] A. C. 716.

It is next objected that Batters is a co-purchaser with the other defendants and that he is not asking for rescission and the rule is invoked that where a contract induced by fraud cannot be rescinded in toto it cannot be rescinded at all. The general rule on that subject is well known. It is that a contract which is not severable must be rescinded in toto or not at all. In this case, the negotiations were conducted with each of the purchasers individually and there was nothing in the negotiations up to the time the agreement was signed to indicate that they were not purchasing each an individual share or interest. If it had been carried out as a several purchase by each of the defendants of a specified interest the case would present no difficulty because then each defendant could return what he had bought without the concurrence of his co-purchasers. The agreement, however, is a joint agreement for a purchase by all the defendants without anything to indicate what share or interest each defendant takes. That being the case I must hold, I think, that the purchase in this case is a joint purchase by all the defendants. Then is there anything in the facts of this case to take it out of the general rule that where

several have been induced by fraud to become joint purchasers rescission cannot be decreed unless all assent to put an end to it?

The situation here is that the nine counterclaiming defendants were induced by the misrepresentations of their co-purchaser Batters, therein acting on behalf of the plaintiffs to join in the agreement. Batters alone refuses to acquiesce in rescission, and the plaintiffs contend that because of his refusal the court is powerless to relieve from liability upon the contract those defendants who were duped by him into signing it. In other words, the plaintiffs say that having procured the signature of the counterclaiming defendants to the agreement by the fraud and misrepresentation of their agent Batters, they are entitled to hold them to it because Batters, who also signed the agreement as a joint purchaser, now refuses to ask for its rescission, and that the defrauded parties must rely upon their claim for damages for the deceit practised upon them.

The only case in point to which I have been referred, or which I have been able to find is an unreported decision of Mr. Justice Macdonald rendered in May, 1914, in Emerson v. Quinn. In that case two defendants were sued for an instalment of purchase money under a joint agreement to purchase. The defendant Quinn allowed judgment to go by default, but his co-purchaser Gallagher defended upon the ground that it was falsely represented to him by Quinn that they were buying on equal terms, whereas, unknown to him, Quinn was the agent of the vendor and in receipt of a secret commission upon the sale and that in this way Quinn's share of the purchase money was paid. The learned judge found the facts as alleged by Gallagher and rescinded the agreement and ordered repayment by the plaintiff of the moneys paid by Gallagher thereunder. The power of the court to grant relief by rescission under the circumstances appears to have been taken for granted.

The case of Morrison v. Earls, 5 O. R. 434 (1884), relied upon by the plaintiffs is quite distinguishable. It is true language is made use of in that case which might be construed as meaning that in no case can there be rescission unless all concerned assent to that course being pursued. The language used must be interpreted in the light of the facts, which were these. The plaintiff sued upon a promissory note given by the defendant for his share of the purchase

by a syndicate of twenty persons of a parcel of land from the plaintiff. The defendant had been induced by the fraud of the plaintiff to join the syndicate and to give the note sued upon. The other members of the syndicate were not parties to the action and were not asking for rescission. The decision was that as the defendant could not restore to the plaintiff the land purchased, his only remedy was damages for deceit: Braun v. Hughes, 3 M. R. 177 (1885), was a similar case. The plaintiff sued to recover from the defendant the money which he, as one of a syndicate of five, had paid to the defendant upon the syndicate agreement to purchase. It was found as a fact that the plaintiff had been induced to become a party to the syndicate and to pay the money repayment of which was claimed by the fraud of the defendant's agent. The other members of the syndicate were not parties to the action and it was held that without their concurrence rescission could not be decreed.

In the present case all the parties concerned are before the court, a fact which sufficiently distinguishes it from both Morrison v. Earls and Braun v. Hughes. The only obstacle in the way of giving the counterclaiming defendants the relief claimed is the refusal of the plaintiffs' agent by whom the fraud was perpetrated to assent to that course being pursued. He is, however, before the court, and as against him rescission may be decreed and the status quo ante fraudem restored, the plaintiffs and Batters being left to work out their respective rights as between themselves as they see fit.

There will be judgment dismissing the plaintiffs' action as against all the defendants except the defendant Batters with costs.

There will be judgment for the same defendants upon the counterclaim:

(1) declaring that they were induced to enter into the agreement sued upon by the fraud and misrepresentations of the defendant Batters, acting therein as the agent of the plaintiffs;

(2) That the said agreement be and is hereby rescinded:

(3) That the same defendants do recover against the plaintiffs the sum of $4,650 with interest thereon at 5% from the day of 1913, the date on which the last of such money was paid and costs of counterclaim

against both the plaintiffs and Batters, without regard to the statuory bar or limitation.

There will be a fiat for costs of examinations for discovery.

MANITOBA.

MATHERS, C.J.K.B. FEBRUARY 13TH, 1915.

TRIAL.

MOLISON v. WOODLANDS.

Public Schools—Consolidation of School Districts—Irregularities and Defects—Debentures Issued Pursuant to Sec. 219, Sub-sec. (g) of Public School Act—Effect.

The signature of the Provincial Secretary and the imprint of the Great Seal on debentures issued pursuant to sec. 219, sub-sec. (g) of the Public School Act cure all defects and irregularities in the formation of a school district, constituting the debentures an indefeasible security in the hands of *bona fide* holders, and is conclusive evidence that the school district "has been legally formed."

W. H. Trueman and Ward Hollands, for plaintiffs.

W. Boston Towers and L. P. Roy, for municipality of Woodlands.

A. C. Campbell and A. V. Darrach, for school district of Brant and municipality of Rockwood.

MATHERS, C.J.K.B.:—This action is brought by three ratepayers of the Rural Municipality of Woodlands residing within the former school district of Macleod, suing "for themselves and all other ratepayers of the said municipality who may come in and contribute to the expense of this suit" against the municipality of Woodlands, the municipality of Rockwood and the consolidated school district of Brant No. 1703. The relief asked for is a declaration that an award purporting to be made under section 123 of the Public Schools Act, reporting in favour of consolidating the three school districts of Macleon, Brant and part of Bruce into one, and the consolidation effected pursuant thereto, are null and void and not binding upon the plaintiffs or other ratepayers of the school district of Macleod, and that

the school district of Macleod is still a legally existing school district under the Public Schools Act.

The former school district of Macleod was wholly within the municipality of Woodlands, and the former school districts of Brant and Bruce were wholly within the municipalitly of Rockwood. The award in question purports to be made by five arbitrators, consisting of His Honour Judge Paterson, chairman, school inspectors Best and Parker, S. Sims, arbitrator for the municipality of Woodlands and W. A. Inkster, arbitrator for the municipality of Rockwood.

Each of the municipal arbitrators was appointed by a resolution of the council of his respective municipalities and not by by-law; but in the case of Woodlands the resolution bears the seal of the municipality; in the case of Rockwood the resolution is unsealed. The municipality of Woodlands appointed its arbitrator because of a request from two of the trustees of the school district of Macleod contained in a letter dated the 18th August, 1913, set out in paragraph 5 of the statement of claim. Before this letter was sent, a meeting of the ratepayers of the Macleod school district had been held to consider the subject of consolidation and at that meeting a vote was taken which shewed 12 or 13 votes for and 9 against consolidation. The municipality of Rockwood also appointed its arbitrator pursuant to a request from the trustees of Brant and Bruce School Districts. In neither case was there a petition of six, or any number, of ratepayers pursuant to ss. (a) of section 123 of the Public Schools Act.

The award in question was made on the 8th of November, 1913, and is set out in paragraph 7 of the statement of claim.

On the 11th of December, 1913, the award was approved by the Department of Education by the following resolution:

"Whereas an award of arbitrators has been published consolidating the school districts of Brant, Macleod and part of Bruce to be known as the Consolidated School District of Brant No. 1703,

"And whereas it is expedient to assent to such award under section 91 (a) of the P. S. A.,

"Therefore the Department of Education doth hereby assent to the said award of arbitrators consolidating the said school district of Brant, Macleod and part of Bruce, and has assigned the number 1703 thereto, the full corporate

name of the district being 'The Consolidated School District of Brant No. 1703.'

"(Sgd.) G. R. Coldwell,

"Minister of Education."

On the 29th November, 1913, a meeting of the new consolidated school district was held for the purpose of electing trustees. Two of the plaintiffs, Molison and McKay, attended this meeting, but took no part in it. They say that they went to the meeting believing it to be a meeting for the purpose of considering consolidation but when they got there they discovered that the consolidation was complete and that the meeting was for the purpose of electing trustees for the new consolidated district.

The first meetng of the new trustees took place on the 7th of January, 1914.

On the 26th of January, 1914, a public meeting of the ratepayers of the new consolidated district was held for the purpose of selecting a site for a new school. At this meeting also the plaintiffs Molison and McKay were present. By resolution a site was adopted at the village of Argyle in the former school district of Brant. Pursuant to this resolution the trustees purchased the site selected.

On the 17th of March another public meeting of the ratepayers was held for the purpose of deciding the kind of school that should be erected on the new site. Again the plaintiffs Molison and McKay were present, but took no part in the meeting. The plaintiff Josling was aware that all the meetings referred to were about to be held and of the time and place of holding the same, but did not attend.

On the 17th of March the trustees of the new school district passed a by-law authorizing the borrowing of $9,000 for the purpose of buying the site and erecting and equipping the new school building, and of issuing debentures therefor. This proposed loan was submitted to a vote of the ratepayers comprised in the new school district pursuant to by-laws to that effect passed by the councils of the municipalities of Woodlands and Rockwood. The vote took place on the 28th of April and the by-law was carried. Of the ratepayers in the municipality of Rockwood 18 voted for the by-law and 2 against. Of those resident in the municipality of Woodlands 7 voted for and 16 against. All the plaintiffs voted against the by-law.

On the 8th of May, 1914, the Department of Education assented to this loan in the following resolution:

"Whereas the Consolidated School District of Brant No. 1703 is desirous of buying a school site, building and equipping a school house for a sum not exceeding $9,000, and for such purpose desires to issue debentures in the said sum of $9,000,

"And whereas it is expedient to assent to such loan under the provisions of section 219 of the Public Schools Act;

"Therefore the Department of Education doth hereby assent to a loan to the Consolidated School District of Brant No. 1703 by an issue of debentures in the sum of $9,000 for the purposes above set forth.

"(Sgd.) G. R. Coldwell,
"Minister of Education."

Debentures were issued by the School Board under its seal to the amount of $9,000 and were presented to the Provincial Secretary, who signed the same under the memorandum, "Issued under the provisions of the Public Schools Act," and affixed thereto the Great Seal of the Province.

On the 20th June, 1914, the trustees sold the debentures issued for $8,840, and on the 13th of July, 1914, this money was paid over to the defendant school district.

On the 9th day of May, 1914, a contract was let for the building of the new school on the site previously selected, the contract price being $7,000. The contractor commenced work at once on the building, and on the 25th day of July, the date on which this action was brought, there had been work done and material provided for the erection of the said building to the amount of about $6,000, and $910 of the moneys raised by the sale of debentures had at that time been paid out.

The contract called for the completion of the building on the 15th of August. On the 13th of October, 1914, it was completed, furnished and occupied. The total cost of purchasing the site, building and equipping the school, was as follows:

Site	$435
School buildings	7,216
Outbuildings	400
Well	117
Fencing	104
Furniture	405
Vans for conveying children to and from school	900

The defendants assert that the plaintiffs have no title to bring this action; that the consolidation of the defendant school district was properly brought about, and that it is now a legal and subsisting school corporation, and that if all the provisions of the Public Schools Act were not complied with in the steps leading up to the consolidation, that the plaintiffs have by their conduct estopped themselves from now complaining.

I am inclined to think that the plaintiffs have no title to sue in the character in which they have sued. The people particularly concerned are the ratepayers of the several school districts, as they were constituted before consolidation. But the plaintiffs' purport to sue on behalf of themselves and all other ratepayers of the municipality of Woodlands, who may come in and contribute to the expense of this suit. No ratepayer of Woodlands outside the boundaries of the former schools district of Macleod has any interest in this matter. Either all the ratepayers of the former school district of Macleod should be parties to the action or at least the plaintiffs should have sued not only on behalf of themselves but of all ratepayers of that district. No person appears to have been misled by the character in which the plaintiffs have sued and as the defect might be cured by amendment I will pass it over without further comment.

Neither municipality appointed its arbitrator in the manner required by the Public Schools Act. The Act says that an arbitrator may be appointed upon a petition of six ratepayers. A letter from a couple of trustees is not the equivalent of a petition from six ratepayers, and cannot possibly be construed as a compliance with that provision.

The award also falls considerably short of being a compliance with sub-sec. (d) of sec. 123.

Had the plaintiffs brought their action at any time before the debentures were issued and approved under the provisions of sec. 219, sub-sec. (g) of the Act, it is probable that they might have succeeded. That section, however, says that after a loan has been approved by the Department of Education and the debentures have been signed by the Provincial Secretary and the Great Seal of the Province affixed thereto, "Such signature and seal shall be conclusive evidence that such corporation has been legally formed and that all the formalities in respect to the said loan and the issue of such debentures have been complied with and of the

correctness of the statement or endorsement thereon, and the legality of such debentures shall be thereby conclusively established and its validity shall not be questionable by any court of this province, but the same shall to the extent of the revenues of the School District issuing the same, be a good and indefeasible security in the hands of any bona fide holder thereof."

It would be impossible to use more comprehensive language. It was manifestly the intention of the Legislature that no matter what defects or irregularities existed in the formation of the School District, once a loan was approved by the Department of Education and the debentures were signed by the Provincial Secretary and sealed with the Great Seal of the Province, they would thereafter constitute an indefeasible security in the hands of an innocent purchaser.

The situation here, then, is that debentures to the extent of $9,000 are a charge against this consolidated school district and the plaintiffs now ask the court to declare that this school district has no legal existence. From November, 1913, the plaintiffs were aware that the defendant school district and the trustees thereof were proceeding under the belief that their legal constitution was unquestioned. They were aware of the negotiations for the purchase of the school site, and of the style of building to be erected upon it. They were aware that a by-law had been carried for the issue of $9,000 debentures. They were aware that a contract had been let for the purpose of erecting a school building upon the site selected, and that that contract was being carried to completion. They must have known that debentures would be issued pursuant to the by-law, which had been sanctioned by the ratepayers on the 28th of April. They must be presumed to have known that if the proposed loan was approved by the Department of Education and if the debentures issued therefor were signed by the Provincial Secretary and sealed with the Great Seal of the province, pursuant to subsec. (g) of sec. 219, such debentures would become an indefeasible security. They must be taken to have been aware that these debentures would be sold and thereby pass into the hands of an innocent holder, and that the proceeds thereof would be paid out to the school contractor.

Knowing all this, the plaintiffs did nothing other than to casually express disapproval, until the 25th day of July, when this action was launched. Before that date they gave

no intimation to any of the defendants of the objection upon which they now rely, or that they intended to raise any question as to the legality of the proceedings upon which the consolidated district depended for its very existence. It might be argued with a good deal of force that it was the plaintiffs' duty to disclose their objection at an earlier stage and that their silence under the circumstances was of that misleading character which estops them from now putting it forward. In the view I take of this case, it is not necessary to decide that question.

I prefer to base my judgment upon the effect of sub-sec. (g) of sec. 219 of the Public Schools Act.

It is contended that this sub-section at most only operates to cure defects and irregularities in so far as the debentures issued and sold are in the hands of a bona fide holder. The bona fides of the holder of these debentures is not questioned. Even if such a contention be well founded, for the purpose of supporting the debentures at least, the signature of the Provincial Secretary and the imprint of the Great Seal is "conclusive evidence" that the defendant school district "has been legally formed." What the plaintiffs now ask is a declaration that although the defendant school district is a legally formed corporation for the purpose of sustaining the validity of its debenture issue, and although such debentures have become a charge upon such school district to the extent of its revenues, it has otherwise no legal existence, and that the school districts of which it was formed are still legally subsisting school district under the School Act.

The result would be that the three old districts would elect trustees and proceed to carry on their schools as formerly. The consolidated district, having no legal existence except for the purpose of paying the debentures, would cease to conduct a school. What would become of the new school building and plant now vested in, what would be declared to be, a non-existent corporation, I am at a loss to say. The ratepayers within the boundaries of what was the consolidated district would be taxed to pay the $9,000 debentures, and would also be taxed for the support and maintenance of their own particular schools.

The chief grievance of the plaintiffs is, I infer, a financial one. Two of them have no school children. As to the third the new school is located about half a mile farther

away than the old school. This disadvantage is more than compensated for by the fact that the new school is much better and more modern in its appointments, but also by the fact that under the new regime vans are used to convey the children to and from school. I have much doubt whether even the dissentient ratepayers of Macleod would welcome success in this action if they knew that the result would be, not the hoped-for decrease, but an increase of taxation.

Be that as it may the whole spirit and intention of the Public Schools Act is, in my opinion, opposed to the creation and maintenance of a school district for the purpose of paying debentures only and not for the purpose of discharging its legitimate functions of conducting a public school. When the organization of a school district had reached the stage of issuing debentures pursuant to a by-law sanctioned by the ratepayers it was manifestly the intention of the Legislature that its legal existence should not thereafter be questioned because of any antecedent informality.

The plaintiffs have stood silently by until circumstances have arisen which make it impossible for the court to grant the relief asked, even if they would have been entitled to succeed had they brought their action before their right to relief had been taken away by operation of the statute.

Having arrived at this conclusion, I have not considered the objections raised as to lack of parties.

The plaintiffs' action will be dismissed with costs.

ALBERTA.

FEBRUARY 19TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

YOUNG v. SMITH.

Fraud — Misrepresentation — Sale of Shares — False and Fraudulent Statement by Seller as to Cost of Shares and Amount Paid Thereon in Cash—Materiality—Inducement.

A false and fraudulent representation made by a seller of shares to a purchaser that he had paid their full value in cash and was making no profit thereon, constitutes a material representation inducing the sale if it is proved that in the ordinary course of events the natural and probable effect of the representation was to influence the mind of the purchaser in the manner alleged.

***Young* v. *McMillan*, 40 N. S. R. 52, disapproved.**

The appeal was heard by STUART, SCOTT, BECK and WALSH, JJ.

G. F. Auxier, for plaintiff, appellant.

A. H. Clarke, K.C., for defendant, respondent.

The judgment of the court was delivered by

STUART, J.:—This is an appeal by the plaintiff from a judgment of the Chief Justice delivered at the close of the trial whereby he dismissed the plaintiff's claim against the defendant as maker of two promissory notes of $1,000 each upon which $400 had been paid and gave the defendant judgment for a return of the amount paid.

The notes had been given in payment of the purchase price of 20 shares of the par value of $100 each in the capital stock of the Kootenay River Land Co. Ltd.

The defendant's defence consisted of a number of alleged misrepresentations as to the nature of the assets of the company which consisted in an interest under an agreement of purchase from one Birtch in certain lands in British Columbia and also a misrepresentation to the effect "that the plaintiff was selling the said stock to the defendant at the actual cost of the same to him without profit to the plaintiff or expense added." The defendant also counterclaimed for

a delivery up of the notes and a return of the money paid thereon.

At the trial practically and upon the appeal finally the defendant abandoned his defence resting upon the allegations in regard to the company and the land owned by it and rested his case solely upon the misrepresentation above set forth. It did not become necessary for the trial judge to deal with the former misrepresentations because it clearly appeared and was indeed admitted by the defendant that he had made payments on the notes after having learned the real facts in regard to the nature of the land and the position of the company. It was found by the trial judge, however, that his knowledge as to the real facts with regard to what the shares had cost the plaintiff was not acquired until shortly before the action was begun and that he had then and before action at once refused to pay and had repudiated the transaction. The learned Chief Justice found that a misrepresentation had been made and that it had been made falsely and fraudulently. It does not appear in his oral judgement that he expressly found the misrepresentation to have been material but the proper inference is, of course, that he considered it to be so.

The general facts were that the plaintiff together with two other men named Currie and Shields had entered into a scheme for the purchase of the land in British Columbia. A company was eventually incorporated and the owner, one Birtch, on 2nd November, 1912, agreed to sell the land to the company for $32,940 upon certain terms, one of which was that $2,500 was paid in cash. The three promoters each advanced one-third of this sum, the plaintiff paying $834. On September 28th, 1912, the plaintiff Young had signed a sort of unilateral agreement not stated to be with anyone, in the following form: "I John Oliver Young of Castor for and in consideration of eight shares of one hundred dollars each ($100) fully paid-up and non-assessable of the capital stock of the Kootenay River Land Co. Ltd., when incorporated, to be allotted at the first general shareholders' meeting and in addition to twelve shares for which I am to pay in cash or its equivalent twelve hundred dollars ($1,200) agree to give such of my time and services as shall be necessary in furthering the promotion of said company."

This document was filed with the Registrar of Joint Stock Companies on March 14th, 1913, but the plaintiff had

on 5th February, 1913, received his share certificate. On February 26th the transaction in question took place. The defendant gave the two notes for $1,000 each at five and eleven months respectively and the plaintiff assigned his shares, a new certificate being issued to Smith. Smith thereupon became a director of the company in place of Young. Smith admitted in his evidence that he knew how much was being paid to Birtch for the land, how much had been paid to Birtch and that this interest in the Birtch land was all the assets the company had. His chief complaint was that Young had told him that the three of them, Young, Shields and Currie had each put $2,000 in actual cash into the company and had got each $2,000 of stock in return.

A second instalment of $2,000 fell due to Birtch on May 1st, 1913. This was not paid although the company had resold some portions of the property to other parties. It was recognised however in June that the company could not carry out its obligations to Birtch and was really bankrupt. Its head office was in Medicine Hat and in June all the books were sent to Smith at Calgary who deposited them in a cellar because as he said there was not room enough for them in his office. He had made two trips to see the land, one in March and the other about the 1st of June. On this latter trip he found that the land was not as Young had represented it but he made no repudiation of his bargain. On August 27th, Birtch served a notice of cancellation of the agreement for default which was to take effect on November 30th. On October 3rd a meeting of the company was held in Calgary at which Shields and Smith were present and at which a resolution was passed authorizing a quit claim deed to be signed releasing the land to Birtch on condition that Birtch should protect the company with regard to subpurchasers. On October 5th Birtch agreed to this and the company surrendered its interest, forfeiting the money already paid.

On July 21st Smith wrote from Vancouver to Young asking for an extension for 60 days on the first note saying that he was going to lose "like a good sport."

On October 15th, 1913, Smith paid $250 on account and on December 4th, 1913, he paid $150 more. It was on account of the making of these payments that it was plainly impossible for the defendant to repudiate liability because

of the alleged misrepresentations as to the character and condition of the land.

Then about January, 1914, the plaintiff began to press the defendant for more payments on the notes, the last one having now fallen due. Letters were written to the defendant at Vancouver threatening suit. On February 3rd, 1914, the defendant wrote from Vancouver saying, "I know you have been looking for a cheque from me but I have just been put to it so hard I can not get it. Am rustling night and day here now trying to make a turn. Will write you when I get back to Calgary. Am sorry but I can not for a few days. Your old friend, Hugh." The defendant said that on his way back to Calgary owing to a remark some one made to him on the train, he became suspicious about the truth of what Young had told him in regard to the shares when the notes were given, that on returning he looked up the books of the company, of which he had been a director all the time and then discovered that Young had not sold the shares to him for what they had cost him in cash, in other words that Young had not put $2,000 in cash into the company.

It seems to me to be impossible to reverse the finding of the learned Chief Justice upon the question of fact as to what was said by Young to Smith at the time of the sale. I am bound to say that a reading of the defendant's evidence has created a suspicion in my mind that the distinction between the payment for the shares in full in actual cash and the general cost of the shares to Young in cash and in time and labour was really suggested to Smith by the questions addressed to him and that if he had been merely asked to state the words used by Young he would never have had used the expressions "real money" and "actual cash" at all. But be that as it may, there was clearly evidence to justify the trial judge's finding and he expressly says that he believed Smith and disbelieved Young.

In these circumstances his finding must stand.

The point of real difficulty in the case is the question of the materiality of the misrepresentation. At first blush it seems a little difficult to perceive how the misrepresentation could have been material in the mind of Smith. He knew the price being paid for the land which the company had been formed to exploit, he knew the amount already paid and that the land was all the assets the company had. If it be said that he may have assumed that the extra $3,500 had

been spent in improvements on the land then in that view the representation assumes the character of a representation as to the condition of the land. This condition, however, he soon discovered. He soon became aware that no such sum had been expended and yet he affirmed the contract by payment on the notes. One of the original misrepresentations he complained of was that there was one-half of the necessary fluming on the land to be used for irrigation purposes and that this was in good condition. When he went over in June he found there was "just the same as no flume at all; it had been built there two, three or four years and left there." From this it is evident that he then learned that no money had been spent on the land by the company at all. And it is really exceedingly difficult to conceive how Smith who became a director at once upon the purchase of his shares who got possession of the books in June, who knew there was no money in the treasury and none spent on the land could have failed to experience some curiosity as to what had become of the $3,500 in cash which he said he was told had gone into the company over and above the amount paid on the land to the vendor. That sum would have more than paid the second instalment due to Birtch. It is also rather strange that Smith never knew of the registration of the agreement referred to with the Registrar on March 14th, 1913, when he was a director and owned the shares referred to in it and when Young had ceased to have any interest in them. Yet the trial judge did believe him when he said that he found out in February, 1914, which must be taken to imply 'for the first time,' that the actual cash had not been paid in. Whatever suspicions one may entertain about it I think that finding must be accepted.

Upon the point of materiality and inducement I think it is quite easy to understand how the statement that Young had paid in cash in full for the shares and was just selling them to Smith at the same price making no profit may have had a considerable influence in inducing Smith to make the purchase. In Halsbury vol. 20, at p. 699 it is said that, "it is sufficient to prove that in the ordinary course of events the natural and probable effect of the representation was to influence the mind of a normal representee in the manner alleged."

In Kerr on Fraud and Mistake, 4th ed., p. 44, it is said: "The test therefore of a material inducement is not whether

the plaintiff's action would but whether it might have been different if the misrepresentation had not been made."

In Amer. and Eng. Encyc. of Law, 2nd ed., p. 61, there is a note of a decision in Maine that representations by the seller of stock in a corporation that all the stockholders had paid for their shares at par was a material representation.

It must further be remembered that both materiality and inducement are questions of fact: Halsbury vol. 20, p. 701. In the present case, the trial judge sitting as a jury evidently considered these facts proven. And upon the evidence I am unable to conclude that he was wrong. With regard to the views expressed by Meagher, J., in Young v. McMillan, 40 N. S. R. 52, to the effect that a statement by the seller as to the price he had paid for goods is not material, I think it needs only to be said that materiality being a question of fact the result must depend upon the special circumstances of each individual case. I do not think it can be laid down as a general rule that such a statement can never be material.

In the present case it seems to me quite possible and indeed even probable if Young had stated to Smith that he had only paid $834 in cash directly and about $365 for expenses and that he had been allowed another $800 for his time and services that Smith would not have agreed to pay him $2,000 for his shares. That I think is as far as we need go in considering the question of materiality.

The only remaining question that need be referred to is the possibility of restitution. The company, is for all that appears, still in existence, the share certificate is in court and can be re-transferred. I do not see that the forfeiture of the agreement with Birtch can make any difference. The business of the company took its normal course. What happened would no doubt have happened if Young had retained his shares. And in any case the representation was found to have been fraudulent and an amendment was allowed permitting the defendant to claim damages for deceit. As the learned trial judge remarked, there can be no difference in the result.

The result is the appeal must be dismissed with costs.

Appeal dismissed.

ALBERTA.

FEBRUARY 19TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

IN RE WESTERN CANADIAN FIRE INSURANCE CO.

COWPER'S CASE.

Company — Winding-up — Contributories — Shares — Subscription—Rescission Before Commencement of Winding-up—Liability of Repudiating Shareholder as Contributory—Verbal Representations—Non-Delivery of Prospectus—Subscription Voidable—Companies' Ordinance. Sec. 57a.

A subscription obtained by verbal representations without the previous delivery of any prospectus is voidable and not void by virtue of sec. 57a of the Companies Ordinance, C. O. 1898, ch. 61.

A distinct unequivocal repudiation of a subscription by a subscriber who is entitled to repudiate conveyed to the directors of a company so that it becomes the duty of the latter to remove the former's name from the list of shareholders is sufficient, if made before the commencement of winding-up proceedings, to entitle the said subscriber to have his name removed from the list of contributories without the necessity for the further step of initiating proceedings before the commencement of winding-up proceedings.

Oakes v. *Turquand* (1867), L. R. 2 H. L. 325; *Reese River Silver Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 64; *In re Estates Investment Co., Paules Case* (1869), L. R. 4 Ch. 497 (C.A.); *In re Estates Investment Co., Ashley's Case* (1870), L. R. 9 Eq. 263: followed.

In Re Scottish Petroleum Co. (1883), 23 Ch. D. 413, not followed.

A shareholder who is entitled to rescind his contract of subscription as voidable must make his election against the contract with promptness, which is to be determined by the circumstances of the case.

Clough v. *London & N. W. R. Co.*, L. R. 7 Ex. 26, referred to.

Case stated by STUART, J.

The court consisted of HARVEY, C.J., BECK, SCOTT, WALSH and STUART, JJ.

A. H. Clarke, for liquidators.

W. A. Wells, for Cowper.

BECK, J.:—Few of the facts set out in the stated case need be repeated.

By the Statute Law Amendment Act, Statutes of Alberta, 1909, Part II., ch. 5, sec. 1, the following section was inserted in "the Companies' Ordinance," C. O. 1898, ch. 61:—

"57.—(a) Every company heretofore or hereafter incorporated under the authority of this ordinance or under the authority of any special Ordinance or Act, the number of shareholders of which is increased to a number greater by ten than the number of applicants for incorporation or which has its debentures or other securities held by more than ten persons, and every company incorporated otherwise than as above set out which has more than ten shareholders or holders of debentures or other securities within Alberta, shall file a prospectus in the manner hereinbefore set out.

"(2) All purchases, subscriptions, or other acquisitions of shares, debentures or other securities of any company required, in the manner above provided, to file a prospectus, shall be deemed as against the company or the signatories to the prospectus to be induced by such prospectus and any term, proviso or condition of such prospectus to the contrary shall be void.

"(3) No subscription for stock, debentures or other securities induced or obtained by verbal representations shall be binding upon the subscriber, unless prior to his so subscribing he shall have received a copy of the prospectus."

The question was raised during the argument whether this section was applicable to this company. But the question must be answered affirmatively because of the later words of the section making it applicable to "every company incorporated otherwise than as above set out," inasmuch as it is admitted that it fulfils the other conditions of the section.

This company was incorporated by a special Act, Statutes of Alberta, 1910, 2nd Session, ch. 24. Sec. 28 (i) of that Act restricts the application of the Companies' Ordinance to this company to the provisions "relating to the right of inspection of the Lieutenant-Governor in Council and the filing of annual returns with the Registrar of Joint Stock Companies and (those) which give the Lieutenant-Governor in Council or the Registrar of Companies the power to compel a proper disclosure by the company of the exact condition of its affairs to which the Western Canada Fire Insurance Company,

Limited" (a company with which amalgamation was authorized by the Act) "is at the time of the passing of this Act subject."

I note some provisions of the company's charter.

Section 3, after providing for the company's capital stock, says: "Such shares shall and are hereby vested in the several persons to whom they shall be allotted their legal representatives and assigns subject to the provisions of this Act."

Section 11 says:

"In the event of the property and assets of the said company being insufficient to liquidate the debts, liabilities and engagements, the shareholders shall be liable for deficiency, but to no greater extent than the amount of the balance remaining unpaid upon their respective shares in the capital stock."

There is nothing in the charter referring to a register of members. Nor does there appear to be any reference to a register in the sections of the Companies' Ordinance regarding annual returns which are made applicable to this company.

It seems to be expedient to note also some of the provisions of the Companies' Winding-up Ordinance, Statutes of Alberta, 1903, 1st Session, ch. 13.

Section 2 (3) says:

"'Contributory' shall mean any person liable to contribute to the assets of a company under this Ordinance in the event of the same being wound up, and in all proceedings prior to the final determination of such persons any person alleged to be a contributory, and shall also include the personal representative or representatives of any such person."

Section 7 states the consequences ensuing upon the commencement of winding-up proceedings, among which are: "Any alteration in the status of the members of the company, after the commencement of the winding-up shall be void."

Section 14 provides for the liquidators settling a list of contributories and sub-sec. (2) says:

"Every shareholder or member of the company or his representative is liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company or to its members or creditors, as the case may be, under the ordinance, charter or instrument of incorporation of the company."

Sub-section (5) reads:

"Any list so settled shall be prima facie evidence of the liability of the persons named therein to be contributories."

Section 15 says:

"The list of contributories may be settled by the court, in which case the liquidators shall make out and leave at the chambers of a judge a list of the contributories of the company."

Section 22 contains provisions respecting the enforcing of payment by the contributories.

I think I have set out all the statutory provisions which have any bearing upon the question to be determined, except those relating to prospectuses, which I refer to further on.

Many of the cases deciding questions analogous to the present one are made to depend to a very large extent upon provisions of the Companies Acts which are not made applicable to this company.

In this case, the first question to be answered is whether a subscription made upon oral representations without any prospectus is by virtue of sec. 57a void or merely voidable. I have no doubt that it is voidable only. The words are "(not) binding upon the subscriber." The provision is clearly for the benefit of the subscriber, and if so, he can waive it—not, I think, precedently or contemporaneously, for waiver at that stage is, I think, if not expressly, at least by clear implication, excluded by the obvious intention of the provisions of the Companies' Ordinance relating to prospectuses which include, I think, not only sec. 57 (a), but by virtue of the expression therein—"a prospectus in the manner hereinbefore set out"—also secs. 55 and 56 relating to the contents of the prospectus; and in sec. 56 (4), we find the provision: "Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section or purporting to affect him with notice of any contract or document not specifically referred to in the prospectus shall be void."

And sub-sec. (2) of sec. 57 (a), which I have already quoted, is a somewhat similar provision.

I see no reason, however, why, after that full disclosure of the condition of affairs of the company, which a prospectus in accordance with the ordinance is calculated to give, the subscriber cannot deliberately affirm his subscription by some

unequivocal act, e.g., subsequently receiving a proper prospectus, investigating the affairs of the company in the light of it and thereupon writing to the company to the effect that, although he had become aware that his subscription was not binding upon him, he had since received a proper prospectus; that he had fully investigated the company's affairs, that he found that they were as represented and that he now affirmed his subscription. If this conduct would be effective, it must be so because the original subscription was merely voidable by him, not void: for what is void cannot be affirmed. A voidable contract, however, is good unless the party entitled to avoid it elects so to do. This is the position in the case of a contract obtained by fraud.

Clough v. London & N. W. R. Co., L. R. 7 Ex. 26, is the leading case. The court there, after referring to a case of a lessor, entitled to re-enter for breach of covenant, where the question was whether he had "waived the forfeiture,' said that the case of a contract obtained by fraud—the case before them—was similar and proceeded:

"In such cases, the question is, has the person on whom the fraud was practiced, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election?

"We think that so long as he has made no election, he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay, the position, even of the wrongdoer, is affected, it will preclude him from exercising his right to rescind."

This general rule is applied in the case of an incorporated company actively soliciting subscriptions or carrying on business where there is a liability upon the shareholders to contribute in case of a deficiency of assets, in this way: A shareholder entitled to rescind as voidable by him his contract of subscription, must make his election against the contract with what, under the circumstances, is to be considered promptness, the reason being that it is obvious that it is at least likely that third parties may have been influenced to become shareholders or creditors by the fact of his subscription.

In Oakes v. Turquand (1867), L. R. 2 H. L. 325, 352, and in the earlier cases, it was held that the shareholder must

also have succeeded in getting his name actually removed from the register of shareholders before a winding-up order was made. Ultimately, the question came before the House of Lords in Reese River Silver Mining Co. v. Smith (1869), L. R. 4 H. L. 64.

The precise point there decided—I quote a portion of the head-note—was this: "If before a winding-up order is made, a person files a bill against a company, alleging that he had been induced by fraud and misrepresentation to become a member of the company and on that ground praying to have his name removed from the lists of its members, he will (on establishing his allegations) be entitled to have his name removed from the lists of the company, although between the date of his filing his bill and the decree of the court upon it, an order has been made to wind up the company." The lords taking part in the judgment were Lords Hatherley (L.C.), Westbury, Colonsay and Cairns.

Lord Hatherley said:

"The argument then is this: We are (say the appellants) within the rule laid down by this House in the case of Oakes v. Turquand, L. R. 2 H. L. 325. We find that there was an agreement, and that this gentleman was, therefore, by the 6th section of the statute, a person who had agreed to take shares. And we find another portion of the statute which says that anybody who has agreed to take shares is a member of the company, and another which says that anyone who is a member is, in certain cases, a contributory; and they contend, therefore, that Mr. Smith is brought by this process within the description of a contributory to the company and that his name ought to remain upon the list.

"The case of Oakes v. Turquand was decided when the position of circumstances was this: A then shareholder had entered into what the House held to be a voidable, but not a void agreement; . . . the agreement subsists until rescinded; that is to say, in this sense—until rescinded by the declaration of him, whom you have sought to bind by it, that he no longer accepts the agreement, but entirely rejects and repudiates it. It is not meant, I apprehend, by that expression 'until rescinded,' . . . to say that the rescission must be an act of some court of competent authority, and that until the rescission by that court of competent authority takes place, the agreement is subsisting in its full rigour. . . . I apprehend the true view of the case is

this: The agreement is valid until rescinded. If in a case of this description, the directors had committed the fraudulent act of putting a man's name upon the list, which they ought not to have put there, and had allotted him shares, so that if it turned out to be beneficial, it would be competent to the person to say: 'Now I elect to hold them because, although coming to me by your fraud upon me, I find it is beneficial to me to hold them, and you cannot aver your own fraud to prevent my so doing;' in that case, the directors could not have taken the name off the list without communication with him. But if immediately that he knows what the directors have done, he says: 'I have made up my mind to reject the contract, and I assert that intention of mine in the plainest and most open manner competent to me, by my communication to you, insisting upon having my name removed, and on your neglecting your duty to remove my name, I proceed to file my bill to compel you to do so'—I take it that thereupon the contract is at an end, and the gentleman is entitled to have his name removed from the list. Because it was the duty of the directors not to wait for the filing of the bill, if they knew, as we must assume them to have known, that the contract had been entered into upon those fraudulent representations. The moment they were told that the contract was rejected, and that he claimed no interest under that fraudulent act of theirs, it was their duty to remove his name, which could no longer be retained there, the contract being thus avoided and by that means to avoid all further controversy.

"That, however, was not done, then what must be the next proposition on behalf of the appellants? It must be that the directors having neglected their duty, having neglected to do that which they were manifestly bound to do, they had thereby given rights to creditors which, if they had performed their duty, could never have had any possible existence. The thing seems absurd upon the face of it, and I apprehend that happily the law does not justify such a proposition.

* * * *

"The Legislature, therefore, having given the court the power, it seems to me that it is perfectly competent to the court to place this list in the condition in which it ought to have been. It ought to have been corrected by the direc-

tors without a suit. Certainly after the bill was filed, it should have been corrected by them."

Lord Westbury was careful to limit the ground of his decision to this:—"That it was the duty of the directors, at the time when the bill was filed at all events, if not before, to remove Mr. Smith's name from the register, and that gives birth to the farther proposition, that what the directors ought clearly to have done, there being a default on the part of the directors, may now be done by the court in pursuance of the right asserted by Mr. Smith in that suit."

Lord Colonsay was equally careful to confine himself to the particular case putting his reason thus:—"That the party having taken steps to have his liability judicially put an end to, and to have his contract rescinded, which he was entitled to have rescinded, and that having been done before the machinery for winding up was put into motion at all, he is entitled to be regarded as if that had been done by the court at the time he demanded it."

Lord Cairns said:—"The clear duty of the directors was, when the claim was made in a way as to which there could be no mistake, to comply with that which was the right of the plaintiff in that suit, and to take his name off the list of shareholders at all events upon the filing of the bill."

In re Estates Investment Co., Paule's Case (1869), L. R. 4 Ch. 497 (C.A.), decided after the decision in Reese River Silver Mining Co. v. Smith, the facts were these:—

Eleven shareholders repudiated their share on the ground of fraud and refused to pay calls. One (Ross) brought an action. It was agreed between the solicitors for the company and the ten remaining shareholders that the position of the latter should not be prejudiced by reason of their not taking proceedings. Judgment was given in the action for the plaintiff; the company appealed; pending the appeal a winding-up order was made. The ten had taken no proceedings. It was held that it was still open to the court to remove their names from the list of contributories.

In re Estates Investments Co., Ashley's Case (1870), L. R. 9 Eq. 263, the court refused to remove the name of Ashley from the list of contributories under the circumstances that he was not one of the eleven shareholders acting in concert with Ross and that he took no steps to repudiate his subscription though with knowledge of these other proceedings and of the company continuing its business but was

awaiting the result of the litigation before deciding whether he would repudiate or not. Special emphasis was laid by the Master of the Rolls (Romilly) upon the necessity for prompt repudiation in such a way that the fact that his repudiation would be beyond doubt a question so that in the event of the company turning out a financial success he could not against the will of the company retain his position as a shareholder.

In Re Scottish Petroleum Co. (1883), 23 Ch. D. 413, the Court of Appeal, affirming in this respect the judgment of Kay, J., held that the actual taking of legal proceedings, before the making of a winding-up order, by the repudiating shareholder or by some other repudiating shareholder, whose proceedings were adopted with the consent of the company as a test case was an essential condition for the removal of the repudiating shareholder's name from the register.

The case was argued on behalf of the repudiating shareholder by Mr. Haldane, the present Lord Chancellor. He contended that "the case of Oakes v. Turquand only decides that in the case of a company there must be a repudiation before the commencement of winding-up and all I need shew is that I repudiated before that time. There are early cases which say that steps must be taken to get rid of the shares before the winding-up, but they cannot be reconciled with the decision of the House of Lords in Reese River Silver Mining Co. v. Smith. . . . The cases are all made consistent by holding that nothing more is required than that a distinct repudiation precluding the allottee from ever claiming the shares should be made before the commencement of the winding-up."

This was the interpretation which I had put upon the decision of the House of Lords in Reese River Silver Mining Co. v. Smith, before reading the decision in Re Scottish Petroleum Co.

The members of this court are unanimously of opinion that the view put forward by Mr. Haldane, as the proper interpretation and logical conclusion to be drawn from the decision of the House of Lords in Reese River Silver Mining Co., is the correct one and that in Re Scottish Petroleum Co. was wrongly decided and that as we are not bound by the decisions of the English Court of Appeal we should not

follow the latter decision. We think that a distinct unequivocal (and therefore irrevocable) repudiation of a subscription (where the subscriber is entitled to repudiate) conveyed to the directors so that it becomes their duty to remove the repudiating shareholder's name from the list of shareholders if made before the commencement of the winding-up proceedings (where that is the only suggested answer) is sufficient to entitle him to have his name removed from the list of contributories without the necessity for the the further step of the initiation of proceedings before the commencement of winding-up proceedings.

Coming to the facts of the present case, it appears that Cowper subscribed for ten shares in the company some time in May, 1911, the application being for some reason post-dated the 6th June, 1911; that on the 6th July, 1911, he repudiated his subscription and asked that his subscription for the shares be cancelled. This was done by letter which was acknowledged by letter of the 13th July, 1911, and although the company declined to accede to the request the letter of repudiation would appear to have been unequivocal. At the time of subscription, Cowper gave two promissory notes totalling the amount of the deposit. He says in his evidence, "Nothing has been paid on the notes. On June 5th, 1911, at the meeting I entered a very strong protest against the application. I took legal advice and wrote letter of July 6th and got the letter of July 13th. I went to the office of the company in Calgary and made a very strong protest. The man there laughed at me. He was a high official of the company. He said they would put me in prison if I didn't pay. I employed a lawyer in Edmonton who made certain enquiries and then told me to await action by the company."

No attempt was, so far as appears, ever made by or on behalf of the company to collect the amount of the notes or any further calls if there were any on the shares until the liquidator by notice dated the 1st October, 1914, notified Cowper that he was on the list of contributories with a liability of $1,000. After a lapse of three years and three months it might I think be very well said that Cowper might well assume that the directors of the company had fulfilled their obvious duty and have removed his name from the list of shareholders. But I prefer to rest the decision of this

case on the ground of his prompt and unequivocal repudiation conveyed to the company as a complete and sufficient rescission of his contract of subscription. Mr. Justice Stuart's question on the stated case is:—Whether quite aside from the truth or falsity of the verbal representations Cowper's name should be removed from the list of contributories owing to the terms of sub-sec. 3 of sec. 57a."

I would for the reasons indicated answer this question affirmatively. Answering this question I think fulfils the duty of this court. The question of costs and any other questions remain, I think, with the judge of first instance.

STUART, J.:—Although I at one time entertained a different impression and gave expression to it I believe in In re Retailer Merchants' Association Ltd., 27 W. L. R. 50, a case which was not quite as fully argued in Chambers as the present case has been before us, I am now convinced that I was there wrong so far as the real point involved in this case is concerned and I concur fully in the opinion of my brother Beck. I just wish to add that it seems to me that when the legislature used the expression "binding upon the subscriber" it should be deemed to have had in mind the distinction which had been drawn by the courts between a void contract and a voidable one and which had been, in frequent cases, expressed by the use of the very term "not binding upon the purchaser" (or subscriber) in reference to voidable contracts.

HARVEY, C.J., SCOTT, and WALSH, JJ., concurred.

ALBERTA.

FEBRUARY 19TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

BRAUCHLE v. LLOYD.

Vendor and Purchaser—Agreement to Purchase Land—Innocent Material Misrepresentations—Payments Made After Discovery of Falsity of—Affirmance of Agreement—Misrepresentation as to Value—Nature of—Fraud—When Finding of Trial Judge Not to be Disturbed—Vendor Former Sunday School Teacher of Purchaser—Fiduciary Relationship.

An agreement to purchase land will not be rescinded where the purchaser makes payments thereunder after the discovery of the falsity of innocent material misrepresentations.

Morse v. *Royal*, 12 Ves. 373; *Moxon* v. *Payne*, L. R. 8 Ch. 881: distinguished.

An agreement to purchase land will not be rescinded on the ground of a misrepresentation as to the value thereof where the purchaser had every opportunity to ascertain the value and to know as much about the matter as the vendor. A representation as to value, being a matter of opinion, should not be placed upon the same footing in all respects as a representation as to actual facts which cannot be matters of opinion.

The principle that a court of appeal may take a different view than that of the trial judge in cases where there is a question of what constitutes fraud in a legal sense (if there is such a thing) upon admitted facts or facts actually found by the trial judge is confined to cases where a clearly established fiduciary relationship exists, and in the absence of such relationship a court of appeal should not declare persons to be guilty of fraud when the trial judge has made a direct finding that there has been no fraud.

Nocton v. *Lord Ashburton*, 83 L. J. Ch. 784, referred to.

Where a sunday school teacher's former pupil, who had reached such an age as to be able to assume the responsibilities of a housekeeper in a college, brought an action long after the relationship of teacher and pupil had ceased against the teacher for the rescission of an agreement to purchase land on the ground of the latter's misrepresentation, it was *held*, that there was no fiduciary relationship existing at the time of the execution of the agreement.

An appeal from the judgment of HIS HONOUR JUDGE CRAWFORD in favour of the plaintiff in an action for the rescission of two agreements by the plaintiff to purchase land from the defendants on the ground of misrepresentation.

The appeal was heard by STUART, SIMMONS, SCOTT, and BECK, JJ.

C. C. McCaul, K.C., for plaintiff, respondent.

Frank Ford, K.C., and W. J. A. Mustard, for defendants, appellants.

STUART, J.:—I think this appeal should be allowed, with costs, and the action dismissed, with costs.

Assuming all the complaints of the plaintiff to be true and that serious misrepresentations of fact had been made to her at the inception of the contract, it is admitted that after she discovered the truth and had learned that the defendants had made misrepresentations to her, she nevertheless made a payment or payments on the contracts. She told the defendants, so she says, that they had not been telling her the truth. Then merely because some further assurance from these same people as to the ultimate prospect of profit, she made a payment. Clearly she then decided to take the lots without being influenced by the original representations. These were cast aside. She knew the facts represented to her did not exist. She affirmed the contract and is now driven to complain that she relied again upon assurances given by men whose statements she then, at any rate, knew to be untrue.

And what were the second assurances? Merely that the lots were worth $600 apiece, and that they would assure her $600 for them in the spring. This in reference to lots she had already paid something on, which she had been interested in as a purchaser for some months, which she had inquired about and this from men who had misled her already.

I am unable to see how the plaintiff can now fall back upon the original misrepresentations. And with respect to the second assurances as to value, it seems to me that she was not then in a position of ignorance on that subject, but knew, or at least must be held to have known, as much about the matter as the vendors.

I can see little reason for assuming any special relationship of confidence or trust, even in the first place and certainly none at a time when she had learned that there was every reason to withhold confidence and to mistrust.

The well-known principle of affirmance after discovery of the real truth should be applied. That is the law and I do not think we should whittle it away merely because a woman of mature years appeals to our sympathy for her loss in real estate speculations.

I quite agree that the principle laid down in Morse v. Royal, 12 Ves. 373, and in Moxon v. Payne, L. R. 8 Ch. 881; but those cases rest clearly upon the existence of actual fraud in the first instance. But the learned trial judge, in

his judgment, spoke as follows with regard to fraud: "It is not apparent from the evidence at all that Mr. Lloyd was actively mixed up in any fraud in the matter, nor does it appear that Mr. Musselman was guilty of any actual fraud." He rested his judgment entirely on the view that an untrue statement had been made as to the value of the property and the advisability of the purchase as an investment. In the face of the direct finding of the trial judge that there was no actual fraud, it seems to me that it is going rather far for a court of appeal to find that such fraud existed. In Nocton v. Lord Ashburton, 83 L. J. Ch. 784, Lord Haldane, delivering judgment in the House of Lords in a case where the trial judge had found no actual fraud or deceit, but the Court of Appeal had made a contrary finding and declared the appellant defendant to have been guilty of fraud, said: "I think that to reverse the finding of the judge who tried the case and saw the appellant in the witness box was, in the circumstances of this case, a rash proceeding on the part of the Court of Appeal." It seems to me that, in this case also, where admittedly there are possibilities of misunderstandings and of words being honestly spoken in one sense and understood in another, it would be rash to declare persons to have been guilty of fraud whom the trial judge declared not to be so. Of course, if it were a question of what constituted fraud in a legal sense (if there is any such thing) upon admitted facts or facts actually found by the trial judge, a court of appeal may no doubt in some cases take a different view, but that principle cannot apply here and it would appear to me to be confined to cases where a clearly established fiduciary relationship exists. I do not think there is any warrant or precedent for extending the principle of fiduciary relationship such as exists between trustee and cestui que trust, solicitor and client, parent and child, to the case of a long previously existing relationship of Sunday-school teacher and pupil when the pupil has reached such an age as to be able to secure a position as housekeeper in a theological college.

The case in my view must be treated in appeal as one of innocent misrepresentation and the requirements of confirmation and acquiescence are then not nearly so strict. In Re The Bank of Hindustan, 42 L. J. Ch. 771, the head-note, which correctly represents, I think, the view of Wicken, V.-C., is: "The right of a person dealing with a company

to set aside (as against the company) a contract founded on the latter's unintentional misrepresentation may be waived or released expressly or indirectly, but cannot easily be waived by anything the person does or omits while the falsehood of the misrepresentation remains doubtful." In the present case, the payment was made after the untruth of all the misrepresentations had been clearly revealed, unless it be the representation as to value upon which the trial-judge rested his judgment. And with regard to that, I think, as I have said, the plaintiff had, by the time she made her payment, every opportunity to ascertain the value of her purchase and know just as much about the matter as the defendants. I think it is exceedingly dangerous to place a representation as to value upon the same footing in all respects as representations as to actual facts which cannot be matters of opinion.

BECK, J. (dissenting):—The particulars of misrepresentation are:

(1) A representation that the lots were within the limits of the City of North Battleford; whereas they are about two and one-half miles from the centre of the city and are beyond the limits of the city.

(2) A representation that a street railway line was in course of construction to run past the lots; whereas this was not the fact.

The plaintiff is a woman. What her age is does not appear. But whatever it is, she is no doubt much younger than Musselman, the agent of the defendants, whose representations were the main cause of her entering into the agreement. She and Musselman had come from the same town in Ontario, where they had known each other well; Musselman being a "church worker" and at one time the plaintiff's Sunday-school teacher. The land in question was in North Battleford, where the plaintiff had never been, but Musselman and members of the defendant firm had been there. The transaction took place in Edmonton. The plaintiff had never engaged in any real estate transactions before, and she so informed Musselman and the defendants. They were real estate agents. It is almost obvious that she spoke the truth when she said that she relied entirely upon Musselman and the members of the defendant firm. Under the circumstances, she could scarcely have done otherwise. At

all events, she does not appear to have consulted any one else, and she says that she felt she could rely upon Musselman because of his standing and their relationship in the east. Under these circumstances, I think that what took place between the plaintiff and the defendants or their agent should be viewed and dealt with, with more strictness against the latter than had they been dealing with a man who had, or might be supposed to have had, much business experience and who obviously was relying upon his own independent judgment and not at all upon those with whom he was dealing; in other words, than with one who was dealing with them at arm's length.

There is a conflict of evidence on a number of material points; and although the learned judge has not found one way or the other upon all or perhaps any of these points, it seems clear from the tone of his judgment that he accepts the plaintiff as a truthful witness.

Her story is this:—

She met Musselman in the street in Edmonton. He stopped her. They talked. He asked her if she had invested in any lots yet—she had only shortly before come to Edmonton; this was the first time they had met. She said: No. He asked her to come to the defendants' office, and told her about the lots in question She said she did not know anything about real estate and did not like to undertake anything of the kind without taking advice or getting some one to go in with her. He coaxed her—pressed her: said it was a good proposition; that he would like her to have a good chance on it; that he wished to shew her that he was a good friend out here, as well as in the east. So she went to the defendants' office. There she saw one of the members of the firm to whom she was introduced by Musselman, who remained and took part in the conversation. They shewed her a blue print. She says: "They said it was a good buy: the payments would be easy; there were eight railways." She thought the blue print produced at the trial was that shewn to her, "because it had those marks on it: there was eight railroads on it." She continues, recounting the conversation: "They said this would be the centre of the town" (indicating on the blue print) "and our subdivision is out in this direction." So I said: "How far would that be if it was in Edmonton?" I said: "Supposing we take the office down here as the centre of Edmonton, and

this" (indicating) "the centre of North Battleford, how far out Jasper Avenue would they be?" and Musselman said: "That would be like away out Jasper Avenue as far as 12th Street from here" (a distance in fact of about 5,500 feet) "which is the best selling property in this city." "Those were the words he used."

She made a down payment of $25 and was given a receipt. Asked why she bought the lots, she said: "I took Musselman's word, because he said: 'Let me shew you I am a friend here as down east. If these lots are not as I tell you, we will see you get your money back,' and Mr. John Lloyd said so, too." This was in April, 1912. The balance of the purchase price was to be paid $10 a month.

She went back to the office to get her formal agreement about the 25th April. She says: "They told me how good the lots were, what a good buy it was," that she agreed to take two more lots, and paid $60 on account. Continuing her evidence, she says: "They said North Battleford" (she had previously said she had never heard of the place before) "had eight railroads, which Edmonton did not have, and that it would not be very long before North Battleford would be a larger place than what Edmonton is; they said there was a street railway there; it is going to Phoenix Park. It will be passing your lots; they are building there now, but it will not be long before they will be passing these lots."

Much of this is denied by Musselman and one of the defendants. But, as I have said, the trial judge seems to have accepted the plaintiff as a truthful witness, and, even if we assume those on the other side to be so also, I can well understand that, with their extremely optimistic views and their interest in disposing of the property, they used expressions which might, by reason of the ambiguity of their meaning and intent, under ordinary circumstances be properly interpreted as perhaps not more than exaggerated commendation and the expression of an honest, though mistaken, opinion while they were such as, by a person of the plaintiff's inexperience and sense of unlimited confidence in Musselman and his associates, would be taken as having a more definite meaning and as meaning what, in reality, she interpreted them to mean; and I think that the defendants must be held responsible upon the meaning she appears to have been justified in taking from ambiguous statements; that, under the circumstances of her complete reliance upon them, they

were bound to make their meaning clear beyond question and if the result of what they said to her was not unreasonably to create a false impression in her mind, the fault must be attributed to them. I am satisfied that she was led to believe that the land was much nearer to the centre of the town than it in fact is: that it was within the limits: that it was in a part of the town where great development was about to take place: that a line of street railway was under construction or at least about to be constructed and would, every one supposed, run past the property. These things were not true, and, though not all precisely stated in the particulars of misrepresentation, are sufficiently indicated therein or covered by the evidence as to permit us to give effect to them.

In my opinion, misrepresentation is established. The plaintiff, however, made a payment after she had discovered the falsity of the representations and it is urged that this constituted a confirmation of the contract which ex hypothesi was theretofore voidable. Here is part of her evidence:

"The Court: Why did you make a payment after you found out the representations as to the car-line and location of the lots were untrue? A. Because this man in the office said: 'I wouldn't part with those lots: they are very valuable; they are worth $600 apiece." He said: 'I will assure you your $600 apiece for those lots next spring.' He said: 'I would hold them.'"

The one who made these statements to the plaintiff was one Wheeler, an employee in the office of the Lloyd Realty Co.

The defendants cannot escape responsibility for these statements. The payment was made by the plaintiff only in reliance on these statements. If they seek to take the benefit of them, they must bear the burden which they carry with them. These statements resulted in the benefit to them of the payment, which they now set up as a confirmation. They must be held to have received that payment subject to the burden of the condition that these statements were true. It is not a question what remedy lies upon these statements turning out to be false, but what aspect do they place upon—how do they qualify—the payment. The plaintiff had been deceived by Musselman, the defendants' selling agent, and also by one or more of the defendants themselves. She had gone back to them, on finding out that the representations

made to her about the lots were not true. She told them that she wanted her money back. William Lloyd told her that if she ever got it back, it would be by suit in court. No doubt, it may well be said that by this time, the plaintiff had lost confidence in the defendants and Musselman. Later on, she called again at the defendants' office, and again asked for her money back. It was on this occasion that she saw—not Musselman or any of the defendants, but—Wheeler, and it was he that made to her the statements I have quoted. Though she may have lost confidence in the defendants and Musselman, there is nothing to indicate that she had reason to distrust Wheeler beyond his being in their employment, and at all events he succeeded in inspiring confidence in himself, which resulted in her accepting his statements. The effect of those statements under the circumstances was, it seems clear to me, the same as if the plaintiff had said to Wheeler: "The Lloyd Realty Co. and Musselman have deceived me; the lots are not as they represented them to be: they refuse to return what I have paid on account of the purchase price and say that its only by going to the expense, risk and inconvenience of an action in court that I can get my rights, but if, as you say, the lots are certain to bring $600 each in the spring, I will hold them. Here is the past due payment." Surely the payment is so qualified that when set up as a confirmation, it is properly said that the alleged confirmation, if a confirmation at all, was a conditional one—conditional on the truth of the statements which were the sole inducement for the payment, and the condition not having been fulfilled, the confirmation is ineffective.

In Morse v. Royal, 12 Ves. 373, it is said:

"But when the original fraud is clearly established by circumstances not liable to doubt, a confirmation of such a transaction is so inconsistent with justice, so unnatural, so likely to be connected with fraud that it ought to be watched with the utmost strictness, and to stand only upon the clearest evidence; as an act, done with all the deliberation, that ought to attend a transaction, the effect of which is to ratify that, which in justice ought never to have taken place."

In Moxon v. Payne, L. R. 8 Ch. 881, it is said:

"Frauds or impositions of the kind practised in this case cannot be condoned; the right to property acquired by such means cannot be confirmed in this court unless there be full knowledge of all the facts, full knowledge of the equitable

rights arising out of these facts, and an absolute release from the undue influence by means of which the frauds were practised. To make a compromise or confirmation of any value in this court, the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection."

At the time of the payment, the parties were not at arm's length, the plaintiff had not equal knowledge with the defendants for she had no knowledge whatever of the value of the lots, she was not free from the influence of the defendants, for through Wheeler, who must be accounted their agent, they had again acquired her confidence, and after that she had no independent advice. I cannot see how, even assuming entire honesty on Wheeler's part, the payment under these circumstances can be deemed a confirmation in the absence, at all events, of any alteration of the defendants' position following the payment.

I would, therefore, dismiss the appeal with costs.

SIMMONS and SCOTT, JJ., concurred with STUART, J.

Appeal allowed: BECK, J., *dissenting.*

ALBERTA.

FEBRUARY 16TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

ABBOTT v. RIDGEWAY PARK, LTD.

Vendor and Purchaser—Agreement for Sale of Land—Land Described According to Registered Plan—Plan in Fact Unregistered—Rescission—Sub-sec. 7, Sec. 124 of the Land Titles Act—"Sold Under Agreement for Sale."

Where land is described in an agreement for the sale thereof according to a registered plan which in fact is not registered until after an action for rescission by the purchaser is brought, the purchaser who repudiates as soon as he has knowledge of the non-registration of the plan is entitled to the rescission of the agreement under sub-sec. 7, sec. 124 of the Land Titles Act, enacting that no lots should be sold under agreement for sale according to a townsite or sub-division plan unless the same had been duly registered, providing that the said section should not apply to any plan then in existence and approved by the Minister.

Veilleux v. Boulevard Heights Ltd., 29 W. L. R. 940, followed.

The expression "sold under an agreement for sale" in sec. 124, sub-sec. 7, of the Land Titles Act means a contract of sale, and not a sale completed by transfer.

An appeal by defendant from the judgment of TAYLOR, DIST.CT.J., in favour of plaintiff in an action brought for rescission of an agreement for the sale of land and for the recovery of the amount paid thereunder.

The appeal was heard by HARVEY, C.J., STUART, and SCOTT, JJ.

H. H. Parlee, K.C., for plaintiff, respondent.

H. R. Milner, K.C., for defendant, appellant.

The judgment of the court was delivered by

HARVEY, C.J.:—On the 27th May, 1913, plaintiff and defendant entered into an agreement for the sale by the defendant to the plaintiff of certain lands therein described as lots 1, 2, and 3 in block 6, according to a plan of Ridgeway Park, on record in the Land Titles Office for the North Alberta Land Registration District as plan No. 1410, and $350 was paid on account of the purchase price. On the 11th March, 1914, an action was begun for the recovery of this sum and for cancellation of the agreement.

It is admitted that at the time of the agreement, there was no such plan as described, registered in the Land Titles Office, nor was it registered until the 9th of April, 1914, after the commencement of the action, though approved by the Department of Public Works in December, 1913. By sub-sec. 7 of sec. 124 of the Land Titles Act, it is provided that, "No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until after the same has been duly registered in the Land Titles Office for the registration district in which the land shewn on said plan is situate, providing that this section shall not apply to any plan now in existence and approved by the Minister."

His Honour Judge Taylor, before whom the action was tried, gave judgment for the plaintiff, relying on Veilleux v. Boulevard Heights, Ltd., 29 W. L. R. 940, decided by Mr. Justice Walsh. We are of opinion that he was right in this. The facts in this case are similar to the facts in that case. It was attempted to be argued that the plaintiff had not repudiated as soon as he had knowledge of the facts giving him the right to do so, and that at least his solicitor

had knowledge. It is true the solicitor seems to have known for some weeks at least that the plan was not registered, but it does not appear that he knew that approval had not been given to it, so as to bring it within the proviso of the section, and it seems quite clear that as soon as the plaintiff knew of his right to repudiate, he did repudiate. In this respect, therefore, the case is the same as the one referred to, and it is unnecessary to consider what might be the result if the facts were otherwise, but we agree with the conclusion reached by Mr. Justice Walsh for the reasons stated by him.

An ingenious argument was advanced in this case which was not presented in the Veilleux Case, namely, that the agreement does not come within the prohibition of the statute, since the statute does not say that "No agreement for sale shall be made," but that "lots shall not be sold," and that this is not a sale, but only an agreement for a sale and that if the plan is registered before the actual transfer is made, the prohibition of the statute is avoided. In support of this argument, counsel cites the definition of "sold" as used in the contract between the Dominion of Canada and the Canadian Pacific Railway Company exempting its lands from taxation, as given in Cornwallis v. C.P.R., 19 S. C. R. 702, and Rex v. C.P.R., [1911] A. C. 328. It is true that in those cases, it was held that, having regard to the terms and the purposes of that contract, the word "sold" was used with reference to a completed sale.

Sir Robert Finlay, in his argument on behalf of the company, in the last-mentioned case, argued that, "The intention of the clause was that the respondents should benefit by exemption, but not their purchasers. That intention would be defeated if 'sale' is construed to include an executory contract which is never executed, for it will pro tanto destroy, while the lands are legally and beneficially the property of the respondents, the exemption which is conferred by the statute."

Having regard to the terms and purpose of the present statute, it is quite clear to us that the meaning ascribed to the word in the C. P. R. contract is not appropriate here. It is an every-day occurrence to hear a man speak of having sold lands "under an agreement" to represent the condition where he has merely entered into an agreement to sell, the agreement being still executory. Similarly, a man commonly

is spoken of as the purchaser or owner "under agreement," where the situation is the same, but viewed from the other side. That this is not merely a common, but a perfectly legitimate use of the word is shewn by the definition of the word "sale" found in the dictionaries. Webster's New International gives as the first definition of the word, "Act of selling; a contract whereby the absolute or general ownership of property is transferred from one person to another for a price or sum of money, or, loosely, for any consideration; also a contract for such transfer of ownership in the future or upon the future fulfilment of some condition (this latter being by some differentiated as an agreement to sell)."

Moreover, the expression is "sold under agreement for sale." By no proper use of the words could that mean a sale completed by transfer. If the words were "sold in pursuance of an agreement for sale," the meaning suggested might be appropriate, but the words used must mean "sold by being under or subject to an agreement for sale."

The purpose also of the provision would be frustrated if the meaning of "completed sale" were to be given to the word. Appellant's counsel, in his written argument, admits that the statute was enacted to prevent fraud on purchasers.

This seems clear, but how could that be accomplished if the purchaser could have no right to get any benefit of it until he had paid his purchase money? The courts could have given him as much relief under those circumstances before the Act as they can now. On both grounds, therefore, this argument appears to be untenable.

The appeal is dismissed, with costs.

Appeal dismissed.

ALBERTA.

FEBRUARY 16TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

RE CUST.

Constitutional Law—Succession Duty—Statutes of Alberta, 1908, ch. 5 (2nd Sess.)—Intra Vires so far as relates to Property Situated Within Province—Direct Taxation.

That portion of the Succession Duties Ordinance relating to property situated within the province, being a direct taxation, is *intra vires* of the Alberta Legislature.

***Rex* v. *Lovitt*, [1912] A. C. 212; *Re Doe*, 27 W. L. R. 803: followed.**

***Cotton* v. *Rex*, [1914] A. C. 176, distinguished.**

An appeal by the Attorney-General of the Province of Alberta from the judgment of BECK, J., 29 W. L. R. 716.

The appeal was heard by HARVEY, C.J., SCOTT, STUART, and WALSH, JJ.

O. M. Biggar, K.C., and G. P. O. Fenwick, for Attorney-General.

Frank Ford, K.C., for Richard Dinwoodie.

E. B. Edwards, K.C., for executors, respondents.

The judgment of the court was delivered by

HARVEY, C.J.:—An application was made to Mr. Justice Beck by the executors of the will of the deceased to determine whether the succession duty payable under the Succession Duties Ordinance in respect of specific lands devised should be paid by the devisee or by the executors out of the residue. Upon the argument, in some manner, the question of the validity of the Ordinance arose and the Attorney-General of the province was notified. After further argument, at which he was represented, the learned judge decided that the Ordinance was ultra vires the legislature on the ground that the duties were indirect taxes.

The Attorney-General now appeals.

The deceased at the time of his death was domiciled within the province and all of the property he left was physically situate within the province so we are not confronted

with any set of facts similar to that in any of the several cases that have been decided by the Judicial Committee, but the learned judge bases his conclusion upon some of the statements and reasoning in the judgment delivered by Lord Moulton in Cotton v. Rex, [1914] A. C. 176.

In that case the question to be determined was whether duty in respect of certain movable property locally situate in the United States of America was payable to the Province of Quebec where the deceased was domiciled at the time of his death. There were two grounds of objection urged; first, that the Quebec Statute did not apply to such property, and secondly, that if it did it was ultra vires. The judgment of the Privy Council decides that the Statute does not apply and that the appeal should be allowed. It then proceeds to deal with what by virtue of that decision had become a hypothetical case covered by the second branch of the argument. It is in this second branch of the case that the reasoning and statements relied on by the learned judge appear. It is urged by counsel that inasmuch as the Cotton case was decided on the ground first mentioned and could not have been decided on the second ground since there were no facts existing in the case to support that branch of the argument this Court should not feel itself bound by that part of the judgment. I cannot accept this view. The fact that, having decided that the Act did not intend to tax property out of the province, it was immaterial to the disposition of that case to decide what would be the result if the Act had so intended appears to me a stronger reason why a subordinate court should feel itself bound by such last mentioned decision because it must have been intended as a guide for future legislation or decisions. That this is the case is also apparent from a statement in the judgment on p. 187: "The latter of the two questions is of the greater practical importance in view of the fact that by a later statute the operative portion of the section has been amended by omitting the qualifying words 'in the province' so that a decision depending on the presence of these words would have no application to the present state of legislation."

I am of opinion, however, that the expressions used in the judgment must be deemed to refer to the matter under consideration and that there would be great danger in assuming that they were intended to have any wider applica-

tion. Thus when it is said on p. 195: "The whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear but to obtain from other persons," which in the opinion of the Committee determines that they are indirect taxes it seems to me that it must be considered that the succession duties referred to are those under consideration imposed upon property locally situate outside the province for the illustration given is that of taxes on property in New York and these remarks are prefaced by this statement appearing on p. 193: "It remains to consider whether the succession duty imposed in the present case would be within this definition (i.e., of "direct taxation") if it be taken that the duty is imposed on all the property of the testator wherever situate."

The conclusion reached therefore on that branch of the Cotton case can have no application here since the only question here is in respect to duty on property in the province.

Moreover, the reasoning does not to my mind apply to the Ordinance in question here.

After quoting certain provisions of the Quebec Statute the judgment proceeds as follows (p. 194): Their Lordships can only construe these provisions as entitling the collector of Inland Revenue to collect the whole of the duties on the estate from the person making the declaration who may (and as we understand in most cases will) be the Notary before whom the will is executed and who must recover the amount so paid from the assets of the estate, or more accurately from the person interested therein." The plan of our Ordinance is entirely different from that. Instead of a person who has no claim to or interest in the estate being called on to pay the duties they are payable by the executor or administrator who is under our law the legal owner of all the estate both real and personal and whose duty it is to pay all the debts and other liabilities of the estate not out of his own property but out of the assets of the estate in his hands. As to duty in respect to property in the province he has no need to go to any one to recover the duties paid because he pays them out of the property itself which is directly liable. It may happen that a specific property is bequeathed in respect to which there is duty payable. In such case the Ordinance (s. 19) gives the beneficiary the option

of paying the duty and taking the whole property but it is the duty of the executor either to deduct the duty or collect it before delivering the property to the beneficiary.

The executor or administrator before the grant of probate or administration is required to give a bond for the payment of the duty (s. 6) but it is limited to the payment "of any duty to which the estate of the deceased coming into the hands of the said executor or administrator may be found liable." This is the only personal liability that is imposed on the executor or administrator and it is no more of a personal liability than is imposed by the bond to be given by an administrator before grant of administration to administer the estate according to law.

Eighteen months is allowed for payment of the duties with provision for an extension of time in the case of estate not coming into the hands of the executor or administrator at once, thus making ample provision to obviate the necessity of the executor being required to pay otherwise than out of the assets of the estate.

The executor or administrator is usually referred to as the personal representative. Inasmuch as by our law he takes the real as well as the personal estate, the word "personal" may be dropped and he is the "representative" of the estate or of those entitled to the benefit and any payment of liability of the estate made by him is as much a direct payment by the estate or the beneficiaries as any payment made through an agent or other representative can be.

Under these provisions the duties appear to come within the definition of direct taxation as accepted in the Cotton case and this appears to have been the conclusion reached in Rex v. Lovitt, [1912] A. C. 212, in which the question was whether duty was payable under the New Brunswick Statute upon moneys deposited in a bank in that province the property of a person who died domiciled in Nova Scotia. It was contended on the argument that the statute was ultra vires in attempting to impose duties on such property. The Judicial Committee held that the property was in the Province of New Brunswick and that the duty was payable under the Statute.

The provisions of the New Brunswick Statute referred to in the judgment are to the same effect as the provisions of our ordinance and it is stated in the judgment at p. 223 that "These provisions shew that the Act under consid-

eration assimilates the tax to the probate duty. It is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator."

If it is within the power of the province to levy the duty when only the property is within the province it certainly could not be less within its power when the owner at the time of his death is domiciled within the province.

It is quite clear that there was no intention in the Cotton Case to qualify the decision in the Levitt case for Lord Moulton says on, p. 196: "In the case of Rex v. Lovitt no question arose as to the power of a province to levy succession duty on property, situated outside the province," which remark also indicates that all that they intended to deal with in the Cotton case was such power. I am of opinion therefore that the present case is really governed by the Lovitt case which appears to me to establish the validity of the Ordinance so far as it levies duties on property within the province. This also was the opinion of Mr. Justice Clement, the distinguished author of a work on the Canadian Constitution, in Re Doe, [1914] 27 W. L. R. 803, the only case to which my attention has been directed in which the province's power as regards property in the province has been heretofore questioned.

In the numerous cases which have been dealt with by the Privy Council there has been no suggestion that the Acts were invalid in toto but only so far as they were beyond the power of the legislature and even if some of the provisions of the Ordinance are ultra vires I see no reason why the provisions which are intra vires should not be valid.

In all the cases on succession duties the matter has been dealt with as one of taxation simply but it appears to me that in so far as the law is one dealing with property in the province it might be considered under the head of "property and civil rights in the province," a subject assigned to the provincial jurisdiction. If an Act were passed declaring that upon the death of any one one-half of his property within the province should become the property of the province I do not see how it could be seriously argued that such an Act would be ultra vires whatever might be said

about its wisdom and justice and when the objections that might be urged on these grounds are forestalled by making the amount taken by the State only a small percentage with reasonable and just exceptions and exemptions as has been attempted in the Ordinance in queston it appears to me that the essence has not been changed. In this aspect the duties are not in fact a burden on the estate at all and hence not of the nature of taxes but are in reality that portion of the estate which the province appropriates, to that extent interfering with the rights of testamentary disposition and inheritance. It is not necessary however to rest the validity of the Ordinance upon this aspect as, for the reasons I have stated it seems that so far as it relates to property situate within the province it is direct taxation within the meaning ascribed to that term by the Privy Council cases.

I would allow the appeal.

By arrangement there will be no costs.

Appeal allowed.

ALBERTA.

FEBRUARY 16TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

CANADIAN NORTHERN WESTERN RY. CO. v. MOORE.

Arbitration and Award — Railway — Alberta Railway Act, 1907, ch. 8—Date With Reference to Which Compensation Ascertained—Fixing of Compensation by Court—Sec. 114 of Act—Evidence—Opinion Evidence—Admissions by Party Suing in Representative Capacity—Costs.

The date of the making of an order by a judge under sec. 105 of the Alberta Railway Act appointing a third arbitrator for an arbitration to fix the amount of compensation for land expropriated is the time with reference to which the amount of compensation is to be ascertained, and the fact that the amount of compensation is fixed with reference to a later date agreed upon by the parties does not affect the validity of the award where the value of the land at the last mentioned date is the same as it was at the date of the making of the said order.

The notice mentioned in sub-sec. (2) of sec. 100 of the Act has reference to the notice to be served under sec. 101.

The evidence of persons who, having seen and inspected property, give their opinion as to its value is opinion evidence within

the meaning of sec. 10 of the Alberta Evidence Act, enacting that only three of such persons can testify on either side.

An award made by arbitrators appointed under the Alberta Railway Act for fixing the amount of compensation for the expropriation of land is invalid where the arbitrators admit the opinion evidence of more than three persons contrary to sec. 10 of the Alberta Evidence Act.

Rice v. *Sockett*, 27 O. L. R. 410, followed.

Under sec. 114 of the Alberta Railway Act the court setting aside an award on a question of law is not bound to fix the amount of compensation.

Where the court set aside an award made under the Alberta Railway Act on the ground of the reception by the arbitrators of inadmissible evidence as to the value of the land expropriated, the award was remitted to the arbitrators since the court found it impossible, by reason of the insufficiency of admissible evidence, to fix the amount of compensation under the provisions of sec. 144 of the said Act.

Atlantic and North-Western Ry. Co. v. *Wood*, [1895] A. C. 257; *Cedar Rapids Manufacturing Co.* v. *Lacoste*, 83 L. J. P. C. 162: referred to.

Admissions made by a party suing in a representative capacity are receivable while made in the said capacity, but not otherwise.

New, Prance and Garrard's Trustee v. *Hunting*, [1897] 1 Q. B. D. 607, referred to.

Where the court set aside an award made under the Alberta Railway Act and remitted it to the arbitrators, it was ordered that the costs of the first arbitration should be paid by the party who insisted, in the face of the most strenuous objection, in forcing in evidence which was inadmissible and the admission of which rendered the whole proceeding abortive.

Cedar Rapids Manufacturing Co. v. *Lacoste*, 83 L. J. P. C. 162, referred to.

An appeal under the Railway Act of Alberta, 1907, ch. 8, by the railway company against an award made by three arbitrators appointed pursuant to the provisions of that Act.

The appeal was heard by STUART, SCOTT, BECK, and WALSH, JJ.

O. M. Biggar, K.C., and W. E. Payne, for railway company, appellant.

Frank Ford, K.C., for the owner, respondent.

The judgment of the court was delivered by

STUART, J.:—The arbitration proceedings began on 16th December, 1913. At the opening the chairman made the following observation, "I suppose it is agreed the compensation must be on the basis of the present value." To this Mr. Greene, who appeared as counsel for the railway company, answered, "we are satisfied," and Mr. Moore, who appeared for the owner answered, "yes."

The arbitration then proceeded and the award was admittedly made upon the basis of the value at the time of the arbitration.

One of the grounds taken in support of the appeal is that the arbitrators took the wrong date at which to fix the value. I was at first inclined to the view that, notwithstanding the agreement above set forth, the most that could be said in support of the award would be that there was a submission to arbitration in a voluntary way outside of the Railway Act, and that the award would have to be dealt with upon that basis. But after reading the evidence I have concluded that it is not necessary to consider the matter in that way. There is nothing in the evidence to suggest that either any of the witnesses or the arbitrators or the counsel engaged thought that there was any distinction to be made between one part of the year 1913 and another part of that year so far as the value of the land was concerned. The only distinctions made were between the value in 1913 and that in 1912 or in 1911. On the contrary there is ample in the evidence to shew that all parties, witnesses and every one else, thought that the value in June, 1913, was just the same as the value on December 16th, 1913, which lattter was the date taken.

Now the order of Mr. Justice Beck, made under sec. 105 of the Railway Act was made on June 25th, 1913, and if that date, and not December 16th, 1913, was the date which should have been taken then it is obvious that no error was committed even if the agreement made at the opening of the proceedings would not control the matter.

The question then is, was the date of the order the proper date to take? I think that it was.

A consideration of secs. 99 to 105 inclusive of the Railway Act seems to me to point clearly to the conclusion that the words "the service of such notice" in sub-sec. (2) of sec. 100 were intended by the legislature to refer to the notice, generally called, I believe, a "notice to treat," served under sec. 101 of the Act. It is true that there does not appear to be any definite direction in the Act that the notice mentioned in sec. 101 shall be served. But sec. 103 for example allows an application to a judge for substitutional service where the "opposite party," a phrase which seems to be intended to indicate the owner or person entitled to convey, cannot be found. Whether or not the notice provided for by sec. 101 is to be taken as the form in which "an application may be made to the owners, &c.," as provided in sec. 99 is perhaps not clear but my suggestion is

that the use of that phrase in sec. 99 and a possible expectation that the application would be made by serving the notice referred to in sec. 101, may have been the reason why the phrase "the service of such notice" is used in sec. 100 although no notice, so designated, had as yet been spoken of.

Assuming then, that this is the correct interpretation of the words "service of such notice" in sec. 100, sub-sec. (2), it becomes necessary to consider further the general interpretation of that sub-section in regard to the time to be adopted for fixing the compensation. The sub-section reads as follows:—

"The date of such agreement or the service of such notice or the order of the judge mentioned in sec. 105 shall be the time with reference to which any compensation or damages are to be ascertained."

Three different dates are here provided for and it is noteworthy that they are named in the order of time in which, in the natural course of the proceedings, they would occur. Section 99 says that ten days after the deposit of the plan, profile, etc., and the publication of notice thereof in a newspaper the company may make application to the owners and thereupon agreements may be made in regard to the matter, including even an agreement as to the method of fixing the compensation. Therefore sec. 100, sub-sec. (2) takes care to fix a date if the parties at the very beginning do everything by agreement. It may be that by their agreement they could vary the date, but if in their agreement no mention is made of the date then the section supplies the date to be taken. Next will come the case where it becomes obvious that the matter cannot be arranged by agreement. A formal notice under sec. 101 and a certificate under sec. 102 then become necessary. The notice under sec. 101 names an arbitrator. Then under sec. 105 the owner may name an arbitrator and these two arbitrators may name a third. If all this proceeds without any difficulty no order of a judge naming a third arbitrator is ever made. In such a case the date of the service of the notice under sec. 101 is fixed as the date at which the arbitrators must ascertain the value. Of if after the service of the notice under sec. 101 the parties then get together and make some arrangement the date of the service of the notice would still apply. Finally, if the two arbitrators do not agree

upon a third or if the owner never names an arbitrator at all, it then becomes necessary to apply to a judge either to name a third arbitrator in the former case, or a sole one in the latter case, and the date of his order is then to be taken as the date at which the compensation is to be fixed.

I think the obvious intention of the Act is to fix the last convenient date occurring most recently before the actual fixing of the compensation. If the matter is arranged by agreement then the date of the agreement is taken. If a formal notice to treat has to be served then, if it does not become necessary to apply to a judge, the date of the service of the notice is to be taken. If, however, it finally becomes necessary to apply to a judge then the date of his order is to be taken.

In the present case the order was made on June 25th, 1913. For the reasons I have given I think the fact that the arbitrators by consent of the parties took the 16th of December instead of the 25th of June in the same year as the date cannot be considered as affecting the validity of the award.

Another objection taken to the award was that the provisions of sec. 10 of the Evidence Act had been infringed. That section reads as follows:

"10. Where it is intended by any party to examine as witnesses persons entitled according to the law or practice to give opinion evidence not more than three of such witnesses may be called upon either side."

By virtue of the interpretation section and of sec. (3) it is clear that this section applies to a proceeding by arbitration under the Railway Act.

The arbitration dealt with four different parcels of land. Four separate notices had been given by the company under sec. 101 of the Act but it seems to have been agreed that one appointment of arbitrators should be made and the order of Mr. Justice Beck of 25th June, 1913, was made with reference to all the four parcels.

At the arbitration proceedings the owner adduced his evidence first.

The first witness, Welton, stated that he was the assessor and secretary-treasurer of the village of North Red Deer, and that he made the assessment for the year 1913. He went on to state the amount at which he had assessed the S.W. 1-4 of section 21. If he had done nothing more it

might be a matter for argument, not only whether he was giving opinion evidence when he merely stated the amount of the assessment, but also whether such evidence was admissible at all, unless he in some way confirmed his assessment by stating his present opinion in the witness box. But with respect to this parcel he went further, in response to questions by the owner's counsel, and shewed how he had arrived at the assessed value and gave the reasons which "confirmed his valuation in assessment." I think this clearly amounted to the expression of an opinion upon the value of this quarter.

Then with respect to the north-west quarter of the same section, although this was not within the limits of the village of Red Deer, he was clearly asked to give his opinion as to its value, and did so by way of comparison with S.W. 1-4 which he had assessed.

I omit his cross-examination because it is the proper rule, I think, that unless a party brings his own witness within the words of sec. 10 and makes him an opinion witness, the opposite party cannot do so by mere cross-examination. Upon examination, he was more explicitly asked his opinion of the value of the south-west quarter, and also as to the effect of the presence of the railway upon the whole section number 21. Welton therefore gave opinion evidence with respect to three of the parcels in question.

The next witness called by the owner was one Stephenson, who stated that he was assessor for the city of Red Deer, and the Red Deer school district, and that he had made the assessment for 1913. He stated that as school assessor he had assessed the S.-W. 1-4, the N.E. 1-4 and the N.W. 1-4 of section 21, at certain amounts, and then stated that in making his assessment he assessed, as nearly as he could, the value, "the actual value in his opinion."

He then turned to that portion of sec. 9, which was referred to in the proceedings as Addison Heights, and clearly was asked to give his opinion of what the proper assessment would be, presumably, according to his method of assessment before explained. Stephenson, therefore, gave opinion evidence with regard to the whole four parcels in question.

The next witness called was William A. Moore. He is a son of the owner, John T. Moore, but the latter was only owner as executor of the estate of Annie A. Moore, his deceased wife. It was contended that he should not in any

case be treated as within the rule. But, quite aside from the possibility that even an owner himself, if he testifies to a matter of opinion ought to be counted as one of the three opinion witnesses permitted, I am of opinion that the mere relationship of father and son could not place the witness in question in the position of an owner. If it had appeared that he was beneficially interested in the property in question, he might, no doubt, have had to be considered as a party, and then the question whether a party, who gives his opinion, should be counted as one of the three allowed, would have had to be decided. But, I see no reason for considering the witness in question as a party in any case. At the beginning of his examination, he was asked his occupation, which he gave as "electrical engineer and real estate." He was obviously called as an ordinary witness, having knowledge of real estate values, whose opinion would be of assistance to the arbitrators, and he should, therefore, be treated, so far as he gave his opinion as to values, as an opinion witness.

His testimony applied to all four parcels in question.

It is clear then, that at the conclusion of Moore's testimony, three persons had given opinion evidence with regard to the three quarters of section 21. Welton did not express any opinion upon the values in Addison Heights.

When the owner proceeded to call his next witness, Hogg, counsel for the railway made a strenuous objection, owing to the provisions of the Evidence Act, to the owner being allowed to call any further witness to testify as to their opinion. A long argument ensued, in which the arbitrators took part, upon the question whether persons who were personally acquainted with the property in question, and had visited and inspected it, should be considered as testifying to facts, or merely as giving opinion evidence within the rule.

The arbitrators at this point decided to hear the evidence of Hogg, subject to the objection. Hogg gave evidence as to what, in his opinion, was the value of all four parcels. At this point, therefore, the rule, if violated at all, had been violated as to sec. 21, and the limit had been reached as to Addison Heights.

Next, the owner called one Von Aueberg. His evidence was objected to upon the same ground, but was admitted

subject to the objection. He gave his opinion as to the value of the property in Addison Heights and thereby the limit laid down by the Act was exceeded, always assuming that the nature of the whole evidence was such as to come within the terms of the Act.

Ultimately, the arbitrators decided that the evidence of persons who had actually seen and inspected the property and testified as to their opinion of its value was not opinion evidence within the Act. In so deciding, I think, with much respect, that the arbitrators were wrong.

In Wigmore on Evidence, vol. 3, paras. 1917-1919, is to be found a very interesting account of the origin of the opinion rule. From this, it appears that in older days, the courts of England, when dealing with lay witnesses, that is, persons who had no professional scientific knowledge and experience, did not consider that any rule was being violated, if these lay witnesses ventured an opinion provided it appeared that they had a personal knowledge of facts, upon which to base an opinion. The objection was first to mere opinion, aside from any knowledge of the facts. But it was felt with regard to persons having skilled scientific knowledge, that it was absolutely necessary to admit their testimony in many cases, although they might have no actual personal knowledge of the facts. Originally, such persons were treated, as Wigmore points out, more as expert assistants to the judge, than as witnesses for the jury, but ultimately they became witnesses for the jury and their mere opinion, though based on no personal knowledge, was admitted upon a hypothetical statement of facts. With regard to lay witnesses, as Wigmore points out, opinions from them were originally not excluded, if they had a personal knowledge of facts, told what this knowledge was, and so shewed the ground of their opinion. But, as time went on, the rule was made more stringent. If it appeared after they had stated the facts within their knowledge to the jury, that the jury were then in just as good a position as they were to form an opinion, then their evidence of opinion was excluded. See par. 1924. Their opinion was then superfluous. It was only in cases where the jury could not be put in as good a position as the witnesses, that he was allowed to go on and give his opinion.

Coming to the question of value, Wigmore, par. 1940, says:

"Our orthodox common law was not troubled with any doubt concerning value testimony as tainted with the vice of opinion. It recognized fully that value testimony necessarily involved 'opinion,' by which was meant a mere estimate as distinguished from a knowing through the senses. But it recognized that value testimony had to be employed, and it was precisely one of the typical accepted instances in which 'opinion' was received."

The point, of course, is not whether opinion evidence is admissible, which is conceded, provided, of course, the witness shews that he is qualified to express an opinion, but what constitutes opinion evidence within the meaning of the Act. There is no doubt that an opinion as to value, even though based upon actual observation and knowledge of the property, without which indeed it would be worthless, must be considered as after all opinion evidence within the meaning of the Act. As pointed out by Falconbridge, C.J., in Rice v. Sockett, 27 O. L. R. at pages 412 and 413, the use of the word 'expert' in the caption of the section does not restrict it to professional men. The words of the section extent to "one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation."

The result is that the arbitrators went contrary to the provisions of the Act in admitting the testimony, on behalf of the owner, of the additional witnesses as to value beyond the three already called.

One of the arbitrators, Mr. Welliver, seems clearly to have appreciated the purpose of the statute, when he said "It seems to me though there would have to be restrictions put on the amount of evidence given as opinion, because that could be kept up, and hold up the court presiding for a considerable length of time."

This, in my opinion, renders the award invalid, and it must be set aside. Rice v. Sockett, ubi supra.

The further question remains to be considered as to what course we should pursue. Sec. 114 of the Railway Act is as follows:—

"Whenever an award exceeds six hundred dollars, any party to the arbitration may within one month after receiving a written notice from anyone of the arbitrators, or

the sale arbitrator, as the case may be, of the making of the award appeal therefrom upon any question of law or fact to the court, and upon the hearing of the appeal, the court shall if the same is a question of fact, decide the same upon the evidence taken before the arbitrators, as in the case of original jurisdiction."

In my opinion, it is impossible for us, for several reasons, to attempt to consider merely the admissible evidence and make an award ourselves. In the first place, the obligation placed upon the court to decide the matter itself seems to be confined to the case where the appeal is upon a question of fact. In the present case, although one ground of appeal mentioned in the notice of appeal is that the amount of the compensation allowed is excessive and unreasonable and not warranted by the evidence, still the real point upon which we set aside this award is a point of law, namely, the admission of inadmissible evidence. I wish to be careful, however, to say that I am by no means sure that we could in every case of some inadmissible evidence having crept in, avoid the obligation cast upon us by the statute to decide the matter ourselves. But it seems to me impossible in the present case to undertake such a duty, particularly in view of the opinions expressed by the Judicial Committee, in the case of Atlantic and North-Western Ry. Co. v. Wood, [1895] A. C. 257, as to the manner in which a court of appeal, under an exactly similar section, ought to deal with the award of the arbitrators. Their lordships there decided that the Court of Appeal should not attempt to become arbitrators themselves, but should pay attention to the award of the arbitrators, and simply review it, as they would that of a subordinate court in a case of original jurisdiction where review is provided for. In the present case, it would be impossible for us to do anything of that kind. The arbitrators admitted very important evidence as to value, which we have decided was inadmissible. It is impossible to say what weight they attached to that evidence. It may quite well be that that evidence was the controlling evidence in their minds. Indeed, upon the strictly admissible evidence we have no award of the arbitrators before us at all; and, although, if the inadmissible evidence allowed had been unimportant and obviously of little weight or significance, it might have been possible in a proper case to proceed to make a decision ourselves, following the direction of the statute, it

seems clear that it would not be proper, and that we are not obliged to do so, here. It would, moreover, be very unjust to the owner for us to do so, because, of the three witnesses he called, thereby exhausting his rights, two were only called to speak of the assessment, and one was to some extent interested, as being connected with the family of the owner, and we should have to take that into account. It is fairly plain that the witnesses whose evidence would have to be excluded were the very ones upon whose opinion the owner placed the most reliance.

The final question is whether we should merely set the award aside, and allow the parties to begin de novo or remit the case to the arbitrators. There seems to have been some doubt as to the court's power, under such a section as we are acting under here, to remit the matter for the re-consideration of the arbitrators. It seems to me that any such doubt must be confined to a case where there is absolutely nothing but a question of fact involved.

In Cedar Rapids Manufacturing Co. v. Lacoste, 83 L. J. P. C. 162, the Judicial Committee, in an appeal from the Superior Court of Quebec, district of Montreal, which had dealt with an award upon appeal, under the section of the Dominion Railway, which is in terms identical with those of our Provincial Act, gave a judgment remitting the matter to the arbitrators. The judgment there proceeded upon the ground that the arbitrators had acted upon a wrong principle in estimating the value of the land taken. The appellants, the expropriating company, had led evidence directed purely to agricultural value, while the respondents had adduced evidence to shew how valuable the land taken was to the appellants for the use of their works. The Judicial Committee said that "the real question to be investigated was for what would these three subjects have been sold, had they been put up to auction without the Cedar Rapids Co. being in existence, but with the possibility of that or some other company coming into existence and obtaining powers." It was apparently, because the evidence was not in a satisfactory condition, that the Judicial Committee made no attempt to fix a value themselves.

The question involved was in one sense a question of fact, viz., the value of the land taken, yet because the evidence had been directed to improper subjects, the court remitted the award. For the reasons I have given, I think,

there are at least as strong grounds here for sending the award back, and this, I think, is the proper order to make.

It may be useful to refer the arbitrators to the judgment in Seamen v. Canadian Northern Ry. Co., 22 W. L. R. 105. The effect of that decision, as applied to the present case, would be that the actual value of each of the four pieces of land taken, may be treated as a separate and distinct fact, upon which three opinion witnesses may be called, while the increased or decreased value of the land surrounding the lands taken arising from the construction of the railway may also be treated as a separate fact as to which three opinion witnesses may be called.

Before concluding, I think, reference should be made to a question as to the admissibility of certain evidence which the appellants tendered, but which the arbitrators rejected. The appeal is to be allowed on other grounds, but as the case is to go back to the arbitrators, the same point will probably arise on the rehearing and it, therefore, is advisable that we should express our opinion in regard to it. The railway company tendered in evidence an affidavit made by John T. Moore to be used on his application as executor for probate of the will of Annie Moore. His signature to the affidavit was proven. Had he been the owner in his own right of the property in question, there can be no doubt that this affidavit, in which he expressed an opinion as to the value of the property, would have been admissible against him as an admission. The only doubt which has existed at all arises from his position as executor. The law as to the admissibility of admissions made by a party suing or being sued in a representative capacity does not seem to be very clearly settled and there have been conflicting opinions. Wigmore, par. 1076 (2), says: "Where a party sues in a representative capacity, i.e., as trustee, executor, administrator or the like, the representative is distinct from the ordinary capacity and only admissions made in the former quality are receivable." This would clearly admit the affidavit in question, because it was made by Moore in his capacity as executor under the will in his application for probate. Again, in New, Prance and Garrard v. Hunting, [1897] 1 Q. B. D. 607, Vaughan Williams, J., said, at p. 611: "What a trustee says or does in the exercise of his duty is evdence against his beneficiaries."

And Wigmore, 1076 (1), says: "Where the relation is not a fiction, but represents a real relation of legal interest —as where the administrative and beneficial interests are divided between trustee and cestui que trust—it would seem that the admissions of the trustee should be receivable."

I think both upon authority and upon principle that the affidavit was admissible. But, of course, like any other admission, it is not necessarily conclusive. It will be for the arbitrators to say what weight they will attach to it and in considering that matter, the question whether Moore had any and, if so, what beneficial interest in the estate will be quite relevant. They may consider also the circumstances under which the admission was made and the time at which it was made. If the time was so far removed from the time at which the value is to be fixed as to make the admission of no real assistance, they may, of course, in their discretion, give no weight to it whatever. They might, I conceive, quite properly go so far as to reject it altogether upon this latter ground.

The respondents should pay the costs of the appeal. I think also that the terms of sec. 114 of the Railway Act are wide enough to give us jurisdiction to dispose of the cost of the first arbitration. The Judicial Committee, in the judgment in Cedar Rapids Manufacturing Co. v. Lacoste, ubi supra, quite clearly considered that there was jurisdiction to deal with the costs of the first arbitration, because they made a direct order that there should be no costs to either party of that proceeding. In the present instance, I think, the costs of the first arbitration should be paid by the respondents. They insisted, in the face of the most strenuous objection, in forcing in evidence which was inadmissible and the admission of which has rendered the whole proceeding abortive.

Award set aside.

THE

Western Law Reporter

VOL. XXX. TORONTO, MARCH 22, 1915. No. 13

ALBERTA.

FEBRUARY 19TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

RUDYK v. SHANDRO.

Elections—Corrupt Practices—Disqualification of Candidate —Evidence—Establishment of Offence Beyond Reasonable Doubt—Alberta Elections Act (ch. 3 of 1909.)

A charge of corrupt practices under the Alberta Elections Act (ch. 3 of 1909) resulting, if proved, by virtue of sec. 269 of the Act, in disqualification seriously curtailing the candidate's civil status, must be established beyond a reasonable doubt, and the failure of the candidate to act as a prudent man is not enough from which to infer the intent necessary to constitute the essential element of the offence charged.

Judgment of HYNDMAN, J., 30 W. L. R. 428, reversed.

An appeal from the judgment of HYNDMAN, J., 30 W. L. R. 428.

The appeal was heard by HARVEY, C.J., SCOTT, STUART, and BECK, JJ.

A. Macleod Sinclair, for petitioner, respondent.

A. G. Mackay, K.C., for defendant, appellant.

The judgment of the court was delivered by

BECK, J.:—In this appeal—one from Hyndman, J.—the only thing open for our consideration is the finding that a corrupt practice had been committed by the appellant, Shandro, one of the candidates in the election, with the result imposed by sec 269 of the Alberta Election Act (ch. 3 of 1909) "of rendering him incapable of being elected to and sitting in the Legislative Assembly or any Municipal Council and of being entered on any voters' list or regis-

tered as a voter and of voting at an election and of holding any office at the nomination of the Crown or any municipal office."

The date of the election was the 17th April, 1913.

The item of the particulars upon which the learned judge made this finding is—as amended during the course of the trial—as follows: "In or about the month of April, 1913, a few days before the 17th April"—the precise date intended seems to be the 8th—"the respondent" (Shandro) "at Vegreville paid to Jordika Lastiwka at Shalka Post Office, Alberta, the sum of $10 and corruptly requested the said Jordika Lastiwka to use the said sum of $10 to buy drinks for the purpose of inducing the electors of the said constituency of Whitford to vote for the respondent. The respondent corruptly promised to pay the said Jordika Lastiwka a further sum later on. On or about the 16th April, 1913, the respondent corruptly paid to the said Jordika Lastiwka the sum of $10 to induce the said Jordika Lastiwka to vote for the respondent and to induce others to vote for the respondent."

This charge is obviously laid in view of sec. 256 of the Elections Act. That section so far as material reads as follows:

"256. Every candidate who corruptly, himself or by or with any person or by any other way or means on his behalf, at any time before or during an election directly or indirectly, gives or provides, or causes to be given or provided or is accessory to the giving or providing or pays wholly or in part, any expenses incurred for any meat, drink, refreshment or provision to or for any person or order to be elected or for being elected or for the purpose of corruptly influencing such person or any other person to vote or refrain from voting at any election shall be guilty of a corrupt practice."

The charge clearly is intended to be one falling under the latter portion of the section and to state it briefly to be as follows:

That Shandro on the 8th April himself corruptly paid Lastiwka $10 "for the purpose of corruptly influencing" —not Lastiwka but—"the electors" of the constituency "to vote for" Shandro.

Not every act which is made illegal is a "corrupt practice." The latter is defined in sec. 2, sub-sec. 3 to "mean

and include bribery . . . or an act declared to be . . . a corrupt practice by this or any other Act of the Legislature of Alberta or recognized as such by the common law of Parliament."

As to the payment of $10 alleged to have been paid by Shandro to Lastiwka on the 16th April the learned judge says:

"Respondent (Shandro) asked him (Lastiwka) to call a meeting and handed him some bills to put up throughout the locality. Lastiwka accordingly advertised the meeting and posted up the bills. On the night of the meeting Lastiwka asked for pay for the work he had done and Shandro gave him $10. Witness (Lastiwka) demanded $15 but was refused the extra amount and was told $10 was sufficient."

Both Shandro and Lastiwka so far agree. As to this payment of $10 the learned judge says:

"Although under the Election Act it was illegal for the respondent to make the payment except through his official agent, still I am of opinion that the remuneration was fair and reasonable for the work which witness (Lastiwka) had done in calling the meeting."

It was an illegal act but not a corrupt practice.

So, the corrupt practice of which the learned judge finds the respondent guilty, is in connection with the payment of the $10 on the 8th April.

Shandro's account of the payment of this $10 is this:

About the middle of March Shandro and Lastiwka met in Edmonton. Lastiwka explained that he owed some taxes and gave Shandro $10 with which to pay the taxes, asking him to make the payment to the tax collector, one Warnliack, who lived in the same neighbourhood as Shandro and whom he frequently met.

On the 8th April Shandro and Lastiwka met in Vegreville. Lastiwka asked Shandro for some money. Shandro said: What do you want it for? Lastiwka said: I got to buy some things before I go home and I am broke. Shandro said: I have that $10 that you gave me that day to pay Warnliack, if you want that, here it is and I gave him that, and he went away. Later on the same day they met again and it was then that the arrangement was made that Lastiwka should call a meeting on Shandro's behalf. Lastiwka agrees absolutely with Shandro so far as relates to the meeting in Edmonton at which Lastiwka gave Shandro the

$10 to pay his taxes to Warnliack and also so far as relates to $10 paid subsequently to the election for Lastiwka's services in connection with calling the meeting including Shandro's refusal to pay him more than $10 although he claimed $15, and also the fact of the payment by Shandro to Lastiwka of $10 in Vegreville on the 8th April.

Where they differ is as to what took place when Shandro gave Lastiwka the $10 in Vegreville; Lastiwka denies that anything was said by Shandro indicating that it was a return of the $10 given him to pay Lastiwka's taxes. Lastiwka's evidence is very confused, some of the confusion being accountable for by reason of his evidence being given through an interpreter who was evidently illiterate in English at all events. Lastiwka's evidence on the point of difference is briefly as follows:

I saw him (Shandro) once out here in Vegreville; I spoke to him. I can't remember straight away what took place at that conversation. I asked him when he was going to call his meeting down at our place. He said if we needed a meeting he would call one.

"Q. What was done at that time? A. Then we had lots and lots of my friends round there; and if you give me something, to spend money; our friends called a meeting.

Q. What was done? A. He said he could not do it at that time. I pay you, if you call my meeting later; then I would not call; he gave me $10.

Q. What did he say, when he gave you the $10? A. I have to call a meeting; of course it is too late to put notices in; I have to go and call the people to the meeting for the 16th.

Q. Did he say anything in addition to telling you you should call a meeting when he gave you the $10? A. He told me to go round and call a meeting, ask them to come there.

Q. What else did he say about the $10? A. No, nothing, he gave me $10. I buy a drink.

* * * * * *

Q. Did he mention what he gave you the $10 for? A. No, I think he gave it for meeting purposes.

* * * * * *

Q. Why did he give you $10 at Vegreville? A. I just asked it. I do not know what he meant.

Q. What did you ask him then? A. Sometimes I like to spend a couple of dollars in town.

Q. Why did you ask him about this money, did you ask him for $10? A. No, I just asked him to give me some money. I like to spend it.

Q. Why did you like to spend it; why was it you wanted to spend the money just at that time? A. I want to get my breakfast, and might have a drink. I like sometimes to have it.

* * * * * *

Q. What did he say when he gave you the $10? A. Mr. Shandro paid me the $10, then said—if you go down and call my meeting.

Q. Did he say anything beyond that? A. No. He gave me his notice and if he too late to put that notice in, go round and call the people and I be there on the 16th night."

He says it was only after the election that Shandro told him that the $10 given him in Vegreville was the $10 he had received from him to pay taxes.

Referring to the same $10 in cross-examination:

"Q. You asked him to give you some money? A. Yes.

Q. You borrowed $10 from him? .A. I asked him for some money and Mr. Shandro gave me $10.

Q. Did you say loan me $10? A. We never talked over nothing.

Q. That $10 had nothing to do with the posting of the bills? A. No."

In the result, Shandro's evidence is that Lastiwka having asked for money Shandro said I will give you back the $10 you gave me to pay your taxes. Lastiwka's evidence is: that nothing was said about it being a return of that money; that Shandro gave it simply because he was asked and said nothing of any purpose he had in giving it.

The learned judge in dealing with this charge says: "Lastiwka testified that he knew Shandro and met him before the election in Vegreville. He promised to have a meeting in the deponent's district. Lastiwka asked the respondent to give him some money to spend among his friends; he wanted the money to buy drinks and meals. Shandro gave him $10 in the hotel at Vegreville; part of which he said he spend in treating farmers from his district.

* * * * * *

"Respondent admitted the making of the payment but says that about two months previously in Edmonton Las-

tiwka handed him $10 to pay his school taxes for him, which Lastiwka admits and Shandro now contends that he did not pay these taxes and when he handed the first $10 to him it was merely a return of this sum. Respondent admitted, however, that at the time of the payment in the hotel nothing was said about taxes and, according to Lastiwka, the first time he heard of this was after the election (the exact time being very uncertain) when Shandro told him this $10 was the tax money which he had held.

"If this was the respondent's intention at the time, I think, under the circumstances, being a candidate, and knowing the law with respect to bribery, as a prudent man he should have made abundantly clear at the time that this was a return of the tax money. I do not think the witness would have been quite so generous in treating the farmers if he had understood it was his own money; the fact too that respondent trusted him to call a meeting, post up his bills, etc., shews that he was considered of some value as a worker and supporter, and therefore in the absence of a clearer explanation I am bound to hold that this payment was made for the purpose of influencing Lastiwka at the election."

The only evidence I can find which tends to support the learned judge's statement that Lastiwka "asked the respondent to give him some money to spend among his friends; he wanted the money to buy drinks and meals" is the somewhat involved answer I have already quoted:

"Then we had lots and lots of my friends round there, and if you give me something, to spend money, our friends called a meeting."

But if this means what the learned judge appears to conclude from it alone, it seems to me to be contradicted by other evidence I have quoted of Lastiwka himself.

Again Shandro not only now contends that the $10 was a return of the tax money but swears that it was distinctly so stated at the time.

Furthermore, there is no evidence in the stenographer's notes before us indicating that Shandro admitted "that at the time of the payment in the hotel nothing was said about the taxes"; his evidence is all positively to the effect that it was expressly mentioned.

If the learned judge has in his notes of evidence anything indicating any such admission by Shandro, which

has been omitted by the stenographer—a thing which sometimes happens—the learned judge must undoubtedly have misapprehended the evidence for beyond question such an admission—coming, as it must have, if at all, after Lastiwka's evidence and after Shandro's positive and reiterated statement to the contrary,—would have called forth some remark or further examination by counsel on either side, which certainly would have, yet does not appear, in the stenographer's notes. At all events these notes contain all the evidence before us and we must confine our consideration to what there appears.

Still further the undisputed fact that on the day preceding the election Shandro refused to pay Lastiwka more than $10 though he urged the payment of $15 for his work in connection with the calling of the meeting naturally leads to the conclusion that he had not attempted a few days before to bribe a man in whom he was now not afraid to incur ill feeling against himself.

The trial lasted several days and there was an interval between a partial hearing at Vegreville and one at Edmonton. It is not surprising, therefore, if the fact be, as I suspect it is, that the learned judge's recollection of the evidence failed him when he came to write his report. Even taking the evidence as the learned judge puts it and taking the reasons he gives for his conclusion, I am convinced from the tone of his remarks that he made no distinction in the principle of decision applicable to the question of disqualification—the result of disqualification is a very serious curtailment of the respondent's civil status—diminutio capitis, the civilians would call it, and I think should be dealt with in the same way as if the charge were a criminal one. That is to say, I think a charge which if proved has so serious a consequence of that character is required to be established beyond a reasonable doubt and that the fact, if it be so, that the respondent failed to act as a prudent man is not enough from which to infer the intent necessary to constitute the essential element of the offence charged. If bribery or other corrupt practice is clearly proved against a candidate, there should be no hesitancy in finding him guilty and the penalty imposed by the statute is in my opinion not too severe. In the present case however as I have indicated it is clear to me that the learned judge's finding of disqualification should be reversed because the evidence fails to estab-

lish the charge, my explanation of the learned judge's expressed opinion to the contrary being that under circumstances which need occasion no surprise he either misapprehended or failed to recollect accurately the evidence, and that even if we ought perhaps to assume that his impression after hearing the entire evidence is more likely to be correct than our conclusions from a written report merely of the evidence relating to the precise charge, yet it is reasonably clear that he acted upon a wrong principle in considering the evidence in respect of this charge—a right principle in respect of all the others—only from the point of view of a balancing of the probabilities and not of the proof of a quasi-criminal charge beyond a reasonable doubt.

The appeal should be allowed with costs and the disqualification removed.

Appeal allowed.

ALBERTA.

FEBRUARY 16TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

DEWYNTER v. FULTON.

Evidence—Sale of Goods—Contract of Sale Reduced to Writing—Contemporaneous Warranty—Admissibility.

Where a contract of sale has been reduced to writing, a contemporaneous representation amounting to a warranty is admissible evidence since a warranty is a collateral agreement to the main one.

An appeal from the judgment of TAYLOR, DIST.CT.J., dismissing the plaintiff's claim without costs.

The appeal was heard by HARVEY, C.J., STUART, and BECK, JJ.

Frank Ford, K.C., and I. B. Howatt, for plaintiff, appellant.

O. M. Biggar, K.C., for defendant, respondent.

The judgment of the court was delivered by

BECK, J.:—The plaintiff's story is this:

The defendant and one Aitken were in partnership in the "gent's furnishing" business in leasehold premises in Edmonton. There were negotiations between the plaintiff and the defendant having in view that the plaintiff should buy the defendant's interest in the partnership. The defendant said he was willing to sell to the plaintiff at a price representing 100c on the dollar of the stock in trade and the furniture and fixtures and the outstanding book accounts which latter the defendant assured him were all good. The defendant was the bookkeeper of the firm and produced to the plaintiff a statement as follows:—

"Aitken & Fulton,
Men's Furnishers,
Namayo Av. & Boyle St.,
Edmonton, March 8th, 1912.

A. E. Aitken.
J. H. Fulton.

Statement.

Stock on hand Feby. 29th, 1912	$9,913 14	
Furn. and Fix.	1,935 10	
Accts. Rec.	1,899 72	
Cash on hand Feby. 29th, 1912..	75 70	
Bank balance	1 92	
Insurance paid in advance	65 00	
Freight in advance	125 00	
		$14,015 50
Liabilities—		
Accounts payable	$1,928 45	
Bills payable	2,806 91	
Bank	1,155 00	
		5,890 36
Net worth		$8,125 22

The defendant's interest in the business being one half, he was entitled on the basis of 100 cents on the dollar to $4,062.61. The plaintiff had during the negotiations proposed to pay $2,000 down and the balance in about a month. It was agreed that if he paid $4,000 at once the $62.61 would be thrown off and the plaintiff accordingly paid the defendant $4,000 as the full consideration for his half interest in the partnership business. Some hours after the sale was concluded the plaintiff asked for some writing to

show his interest in the business and thereupon the defendant drew up a memorandum which was signed by Aitken, the plaintiff and the defendant. It was as follows:—

"Aitken & Fulton,
Men's Furnishers,
Namayo Av. & Boyle St.,
Edmonton, March 9th, 1912.

This agreement made in triplicate, dated March 9th, 1912, between J. E. B. DeWynter, Purchaser, J. H. Fulton, Vendor, and A. E. Aitken, as party remaining in the business.

The purchaser agrees to buy and the vendor agrees to sell half interest in the Men's Furnishing Business conducted at 427 Namayo Ave., known as Aitken & Fulton. The Vendor agrees to relinquish half interest in all stock, fixtures, book accounts, leases, good will and any assets and liabilities belonging to said Aitken & Fulton. The Purchaser agrees to assume half interest in all stock, fixtures, book accounts, leases, good will and any assets and liabilities belonging to the said Aitken & Fulton.

The consideration of this agreement to be Four Thousand Dollars to be covered by sight draft on Toronto.

It is further agreed that the force of this agreement shall commence March 1st, 1912.

It is further agreed between J. E. B. DyWynter, J. H. Fulton and A. E. Aitken that we are each and every one content with the terms and stipulations set forth in this agreement.

A. E. Aitken.
J. H. Fulton.
J. E. B. DeWynter."

The plaintiff, although no doubt he might have done so, did not make any examination of the books, invoices or accounts on which the statement was based but relied upon its being correct. The plaintiff brings this action alleging first a verbal agreement into which he entered on the basis of the truth of the statement of assets and liabilities furnished to him by the defendant whereby he agreed to pay at the rate of 100 cents on the dollar of the net assets and alleging as a second alternative the written agreement to buy at $4,000 into which he was induced to enter by the fraudulent misrepresentations of the defendant: and he claims damages and alternatively an account.

He sets out the particulars in which he alleges the statement was incorrect. They may be summarized as follows:

Over valuation of fixtures	$106 25
Over valuation of stock	146 00
Liabilities of the firm omitted	439 57
Accounts stated to have been owing to the firm but found not to be owing	380 82
Bad accounts	126 35
	$1,199 09
Of which plaintiff claims half	$599 50

The learned judge based his judgment upon the ground that the agreement between the plaintiff and the defendant had been reduced to writing and that he could not go behind that. He expresses no view upon the credibility of the witnesses though one may perhaps surmise that he took an unfavorable view of the defendant's evidence from the fact of his depriving him of costs.

The defendant's story is that the sale was made for $4,000 as a lump sum; that it was not made even upon the basis of the statement of assets and liabilities. I have no hesitation in believing the plaintiff's account of the transaction. His evidence is clear and distinct. It is corroborated by Aitken and by one Boyd. It accords with all the probabilities. The defendant's evidence, to my mind, is opposed to the probabilities.

I am quite satisfied of the substantial correctness of the plaintiff's story.

I think the evidence establishes a warranty on the defendant's part, (1) that the accounts payable by the firm were as set down in the statement furnished by him to the plaintiff; (2) that the accounts receivable by the firm were also as therein set down; and that to the extent that the plaintiff can shew that the former item is less and the latter item greater than is set down in the statement he is entitled to damages as on a breach of warranty. As no evidence was taken on the quantum of these amounts there must be a reference.

As to the "over-valuation," as the statement of claim puts it, of the fixtures I think the plaintiff has not shewn that he is entitled to anything or to a reference.

The evidence does go to the extent of saying that the price was to be 100 cents on the dollar for the fixtures as well as the stock in trade but I doubt very much whether this was the intention of either party. The plaintiff as I have said puts it as "over-valuation" in his statement of claim and one of the items of particulars is "cost of repainting signs." This suggests estimated value. not cost price, at all events as to smaller articles and those subject to depreciation from wear and tear. The item of stock in trade is nearly $10,000, that of fixtures less than $2,000. The possible distinction in the method of making up to the two items—the one from the actual invoices; the other probably by estimate or at best from miscellaneous accounts for material supplied and work done at different times was not adverted to during the examination of witnesses. Items totalling the comparatively small sum of $106.25 might well have been the results of mere mistakes in calculation in ascertaining the large item of $1,935.10.

The Sales of Goods Ordinance (C.O. 1898 ch. 39, sec. 2, sub-sec. 1 (o)) defines a warranty as follows:

"Warranty means an agreement with reference to goods which are the subject of a contract of sale, but collateral to main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."

Whether a statement made in relation to the subject matter of a contract of sale is to be taken to be a condition (which under some circumstances sinks to the status of a warranty) or a warranty or a mere representation is a question of construction: Behn v. Burness (1863), 3 B. & S. 751, said in Ker & Pearson-Gee's Sale of Goods Act, p. 70, to be the locus classicus on the subject.

In Bentsen v. Taylor Sons & Co., [1893] 2 Q. B. 280, it is said:

"When a contract is entered into between two parties, every representation made at the time of the entering into the contract may or may not be intended as a warranty, or" (i.e. equivalently) "as a promise that the representation is true. Where the representation is not contained in the written document itself, it is for the jury to say whether the real representation amounted to a warranty."

On the evidence, I think, as I have already said, that the representation made by the defendant was, to the extent I have indicated, a warranty, that is, a promise that

the representation was true and affords a ground for an action for damages independently of the question whether the representation was fraudulently or carelessly or innocently made.

In this view the question of the contract having been reduced to writing is of no consequence. A warranty is a collateral agreement to the main agreement and there is no rule which excludes it from being given in evidence.

In my opinion the appeal should be allowed with costs and judgment should be directed to be entered in the court below for the plaintiff for the amount which shall be ascertained on the reference together with his costs of the trial and of the reference unless a judge of that court should otherwise order with regard to the costs of the reference.

Appeal allowed.

ALBERTA.

FEBRUARY 16TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

MAGRATH v. COOK.

Promissory Note — Endorsement — Company — Officer Endorsing Without Authority.

A note was endorsed "S. S. Franklin, Ltd., per R. C. Sheedy." Sheedy had power to endorse notes in the ordinary way for the company. The note in question was endorsed by Sheedy, for the personal indebtedness of S. S. Franklin, and the company received no consideration therefor:—

Held, that no inference could be drawn from the fact that Sheedy had power to endorse in the ordinary way, that he also had power to endorse for the purpose for which he did endorse.

An appeal from the judgment of HIS HONOR JUDGE CRAWFORD dismissing the plaintiff's action.

The appeal was heard by HARVEY, C.J., STUART, and BECK, JJ.

H. H. Parlee, K.C., for plaintiff, appellant.

C. H. Grant, for defendant, respondent.

The judgment of the court was delivered by

HARVEY, C.J.:—This case differs very little from that of Standard Bank v. McCullough (reported in this issue) in which I have dealt with the law. The plaintiffs claim to be holders in due course of a note given by defendant to S. S. Franklin, Ltd. This is denied by the defence. The note is endorsed "S. S. Franklin, Ltd., per R. C. Sheedy." Sheedy was a witness and the only evidence of his authority to endorse the note to the plaintiff is the following part of his evidence:

"Q. You are the secretary and treasurer of S. S. Franklin? A. I was.

Q. And transacted their banking business? A. Yes.

Q. And had power to sign for the company? A. Yes."

Owing to the indefiniteness in time and indefiniteness as to the signing, I feel some doubt whether this evidence would be sufficient to answer, prima facie, the burden of proof, but assuming that the time he was secretary is the time when he endorsed the note and that the power to sign means the power to endorse in the ordinary way and that the authority may be proved in this way rather than by the records of the company, no inference could I think be made of any power to endorse and transfer a note of the company without consideration to the company and the evidence in this case establishes that the note was delivered to the plaintiffs for a personal indebtedness of S. S. Franklin and that the company received no consideration whatever. The plaintiffs have therefore failed to shew that the endorsement was made with authority and therefore that it was the endorsement of the company.

There are other defences raised in this case also but in view of the conclusion reached on this objection at the threshold it is unnecessary to consider them.

I would dismiss the appeal with costs.

Appeal dismissed.

ALBERTA.

HARVEY, C.J. FEBRUARY 22ND, 1915.

CHAMBERS.

RE CHRISTENSON.

Will—Construction — Printed Form with Blank Spaces—Property Devised Not Mentioned—Devisee Named—Devisee also Executor—Court Leans Against Intestacy—Executor Taking Whole Beneficial Interest—Wills Act (1 Wm. IV., ch. 40)—Married Women's Relief Act (ch. 18 of 1910, 2nd Sess.).

A will contained the following clauses: First, I give and direct that my *executors* hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be; second, after the payment of such funeral expenses and debts I give, devise and bequeath *to Jens Buhl of Lindsay Platte Co., Nebraska;* lastly, I make, constitute and appoint *Jens Buhl of Lindsay Platte Co., Neb.*, to be *executor* of this my last Will and Testament, hereby revoking all former wills by me made. The will was on a printed form, the blank spaces thereon being filled in by a non-professional person with the above italicized words:—

Held, that the words "after payment of such funeral expenses and debts" formed an elliptical expression leaving something understood; that the words "what is left of my property" being clearly omitted, must be read into the will after the word "bequeath", there being a presumption that a testator intends to dispose of his entire estate and not to die intestate as to the whole or any part thereof.

Perkins v. *Fladgate* (1872), L. R. 14 Eq. 54, 41 L. J. Ch. 681, referred to.

Held, debutante, that the executor took the whole beneficial estate under the Wills Act (1 Wm. IV. ch. 40), since that intention was clear from the terms of the will; that the said principle applied to real as well as to personal property owing to the fact that real property now goes to the executor and is to be disposed of by him as personalty.

An application by the widow of the deceased for the construction of a will and for relief under the Married Women's Relief Act (ch. 18 of 1910, 2nd Sess.).

J. F. Lymburn, for widow.

W. J. A. Mustard, for executor.

HARVEY, C.J.:—The will of the deceased is on a blank printed form and the blanks appear to be filled in by some one who was not a professional man.

The printed part relating to the disposition of the property is as follows:—

"First, I give and direct that my execut hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

"Second, after the payment of such funeral expenses and debts, I give, devise and bequeath"

Then follows a considerable blank space, followed by the clause for appointment of executor.

"Lastly, I make, constitute and appoint to be execut of this my last Will and Testament, hereby revoking all former wills by me made."

The first clause is filled in to read "executors." The second clause has the following words written at the end "to Jens Buhl of Lindsay Platte Co., Nebraska." And the blanks in the last clause are filled in "Jens Buhl of Lindsay Platte Co., Neb." and "tor." One witness is described as of Lindsay and the other as of Omaha, Nebraska. The will is dated 20th April, 1914, and the testator is described as of Edmonton, Alberta. The testator left a widow, but no children. The widow now asks for a declaration that there is an intestacy under the will in which event she would be entitled to the whole estate, after payment of debts. I have no evidence before me as to the extent of the debts, but it is admitted by counsel that the whole estate consists of a half interest in a lot in Edmonton, worth a few hundreds of dollars, and the rights under a homestead entry made by the testator during his lifetime.

In Jarman on Wills, ch. XII., it is stated that, "In the construction of wills, the most unbounded indulgence has been shewn to the ignorance, unskilfulness and negligence of testators," and that "In modern times, instances of testamentary gifts being rendered void for uncertainty are of less frequent occurrence than formerly."

In 40 Cyc. 1409, it is stated that, "The presumption is that a testator intended to dispose of his entire estate and not to die intestate as to the whole or any part thereof."

Now the terms of the will leave no room to doubt that the testator had no intention of leaving anything to his wife and, therefore, if there is an intestacy, effect will not be given to any expressed intention. It is also clear that he did not intend to give something to the person whom he names as his executor. The extent of such gift, however, is not made clear in language ordinarily used. We might add after the disposing clause "my homestead rights" or "my interest in

the Edmonton lot" or "one hundred dollars," and then we would have a sentence of common language with a definite meaning, any one of which dispositions, however, would leave an intestacy in part and for no one of which is there the slightest support in the will. We might also add the words "all my property," which would leave no intestacy, but for which I see almost as little warrant.

However, taking the language as it is, it appears to me that the words "after payment of such funeral expenses and debts" form an elliptical expression, leaving something understood. If anything such as I have suggested were added the words to be understood appear to me to be some such words as these, "out of what is left of my property," and there being no such words at the end, the words to be understood perhaps should be "what is left of my property," and we would have the clause reading "What is left of my property, after the payment of such funeral expenses and debts, I give, devise and bequeath to Jens Buhl," which would be a complete disposal of everything. This is perhaps not really filling in any words, but merely reading words which are clearly omitted and must be understood on the presumption, which appears justified, that the testator intended something. Something of this sort appears to have been the view of Bacon, V.C., in Perkins v. Fladgate (1872), L. R. 14 Eq. 54, 41 L. J. Ch. 681, where he held that the words "after these legacies are paid, I leave to my sister Mary Perkins without any power or control whatever, of her husband John Perkins," disposed of the residue, being of opinion that the testator intended to dispose of all his property, in other words, presuming against intestacy.

Perhaps it would be sufficient to decide the case on this reasoning, but there is another aspect which appears to lead to the same conclusion.

Prior to the Wills Act of 1830 (1 Wm. IV., ch. 40), the executor took beneficially any undisposed of property, but by that Act, it was provided that thereafter he should not do so, unless it appeared by the terms of the will that he was to take it beneficially. Though at that time the executor only took the personalty, now that real property goes to him and is disposed of as personalty, I think the principle may be treated as general. In the present case, it is clear that the testator intended to benefit the executor and though it may

be argued that he has not shewn his intention to benefit him as to all the property, still there appears to me much force in the view that the intention is clear enough to prevent the operation of the statute. Considering all the grounds I have mentioned, I have come to the conclusion, though not without some feeling of doubt, that the proper construction of the will is one which declares that Jens Buhl, the executor therein named, takes the whole beneficial estate.

I have less feeling of doubt that this contruction gives effect to the real intention of the testator than I have as regards his expressed intention by reason of the facts which I have now to consider.

By this construction, the widow is deprived of all benefit under the will and she now applies for relief under "The Married Women's Relief Act" (ch. 18 of 1910, 2nd Sess.). By this Act, if the widow takes less under the will than she would take in the event of intestacy, the court may make her such allowance out of the estate as may be just and equitable and to that extent set aside the testator's disposition.

Sec. 10, however, provides that "Any answer or defence that would have been available to the husband of the applicant in a suit for alimony shall equally be available to his executors or administrators in any application made under this Act."

It is contended that this means that what would be a complete defence to an action for alimony will be a complete defence to an application such as this.

In her affidavits in support of this application, the widow states that she is 33 years old and has two sons of 10 and 12 years of age, the offspring of a former marriage, that she has no property for the support of herself and her sons, except a half interest in an Edmonton lot transferred to her by deceased and her dower rights in some property in the United States, that she married her husband in June, 1910, in Montana, and came with him to Alberta in August following, where she remained in Edmonton and he went on to a homestead. She says that at the time of the marriage he owned a ranch in Montana and some cattle, and that she had some cash and chattels and that she advanced him certain sums which he never repaid.

I am of opinion that I need not consider these claims for moneys advanced, for if they were not gifts, she can make her claim for the return against the estate.

In June, 1911, she brought action for alimony against the deceased. This action was settled by an agreement between the parties made on the 18th October, 1912, by which the defendant gave the plaintiff in settlement of her claim a one-half interest in the Edmonton lot, to which reference has been made, which lot apparently was practically all the property he had.

By the agreement, the widow, the then plaintiff, "expressly covenants and agrees that she will not at any time hereafter make any claim whatsoever against the party of the second (? first) part for alimony or support and by these presents hereby releases the party of the first part from all claims or rights against the real or personal property of the party of the first part, which she may have or may hereafter acquire by reason of being the lawful wife of the party of the first part." It is admitted by counsel that after the marriage, the ranch in Montana was sold by deceased without the knowledge of his wife, but whether before or after the agreement does not appear. It is in respect of that that the widow has an action now pending in the Montana Courts claiming dower rights. It seems probable the property was sold before the agreement and the proceeds put in the lot in Edmonton, since that was all the property of the deceased at the time of his death, for which he had expended money. If the widow succeeds in establishing her right to dower, she will have a life interest in a one-third share in that property, of which, if the proceeds were all used in purchasing the Edmonton lot, she has already had a half interest absolutely. Prior to ch. 13 of 1901, by which the wife takes all of the property of a deceased husband who dies intestate, leaving no children, she took only a one-half interest.

It may be assumed that the reason for the change of the law in this respect was due to the fact that in this new country, the wife frequently, if not generally, does as much towards acquiring the property as the husband and that if he had made a will, he would probably have left it all to her when he had no children.

Both of these reasons are absent here. The wife, if she lived with her husband at all, did so only for a few months. and probably furnished little, if any, assistance towards acquiring the property he left. He did make his will and did not leave her anything. He had already provided for her in a manner which was apparently satisfactory to both and

which gave her what under the former law would have been as much as she would have taken at death in intestacy, which if he were near her own age, might reasonably have been expected not to occur for many years.

Without deciding definitely whether the agreement is binding, or, if so, would be an absolute bar to the present application, I am of opinion that the applicant has not made out a case such as would justify me, in the interests of justice and equity, in interfering with the testator's disposition of his estate.

The costs of the application for construction of the will should, I think, come out of the estate, even though that involves the payment by the successful party. I see no reason. however, why the other application should not be paid by the unsuccessful party and as they were both treated practically as one, I will dispose of both, without costs.

ALBERTA.

FEBRUARY 16TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

STANDARD BANK v. McCULLOUGH.

Promissory Note—Endorsement—Company—Officer Endorsing Without Authority.

A note purporting to be endorsed by a company does not constitute the endorsee a holder in due course unless the person signing the company's name has actual authority.

***Smith* v. *Johnson* (1858), 3 H. & N. 222, distinguished.**

An appeal from the judgment of HIS HONOUR JUDGE CRAWFORD, dismissing the plaintiff's action, which was brought on a promissory note made by defendant in favour of Canadian Mercantile Co. Ltd., of which the plaintiff claimed to be holder in due course.

The appeal was heard by HARVEY, C.J., SCOTT and STUART, JJ.

G. B. Henwood, for plaintiff, appellant.

B. Pratt, for defendant, respondent.

The judgment of the court was delivered by

HARVEY, C.J.:—It is, amongst other things, denied that the plaintiff is a holder in due course, and that the note was endorsed to plaintiff by Canadian Mercantile Co., Ltd. I think the defendant is entitled to succeed on this ground, and it is, therefore, unnecessary to consider any other defence. The defendant having denied that the plaintiff is a holder in due course, the first thing the plaintiff is called on to shew is that it is the holder of the note. If it establishes that, then by sec. 58 of the Bills of Exchange Act, it will be deemed to be a holder in due course, unless coming within the exception specified by the section. "Holder" is defined by sec. 2 of that Act as meaning "the payee or endorsee of a bill or note or the bearer thereof," and "Bearer" is defined by the same section as "the person in possession of a bill or note which is payable to bearer." By sec. 21 (3), a bill is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank. The note in question is payable to "Canadian Mercantile Co., Ltd., or order." Consequently, for the plaintiff to become the holder, there must be an endorsement by the company. On the back of the note appears the words "Pay to the order of the Standard Bank of Canada," placed on with a stamp, followed by the written words "Can. Mercantile Co., Ltd." There is no evidence to shew who actually wrote those words other than that of experts that they believe it is in the handwriting of W. D. Stewart, who was the secretary of the company.

Sec. 51 provides that a signature by procuration gives notice of the limited authority of the agent and that the principal is bound only if the agent has actual authority to sign. A company can, of course, only sign by procuration.

The company was one incorporated under our Companies Ordinance, which provides by sec. 96 that notes, etc., may be made and endorsed in the name or on behalf of the company by any person acting under the authority of the company.

The only evidence there is as to who had authority to make or endorse notes or bills for this company is a resolution of the company which was filed with the plaintiff prior to this transaction authorizing the president and secretary to sign cheques. In addition to that, this note was given to the plaintiff by the secretary as collateral security for a note

of the company which was signed in the name of the company by both the president and secretary. There is thus no evidence that the secretary had authority to endorse, even if we assume that it is proved that the endorsement is that of the secretary, but there are circumstances from which it might be inferred that he had no such authority.

It was contended by counsel, however, that, though the company might not be bound by the endorsement, yet it migth be sufficient to pass the title to the plaintiff, and he cited in support of that the case of Smith v. Johnson (1858), 3 H. & N. 222. In that case, the endorsement was made by persons who had no authority and one of the judges did say that while the endorsement was not such as to make the company liable, it was sufficient to transfer the title. The difficulty in that case, however, was one of pleading. The plaintiff had alleged the endorsement of the company. No such endorsement was necessary to transfer the title, because the bill had already been endorsed in blank and was, therefore, payable to bearer. Consideration was given to the company and the note was delivered to the plaintiffs by an officer of the company, the endorsement being by the chairman and deputy chairman.

The real question was whether there had been a delivery, though the plea had alleged an endorsement.

It appears to me that sec. 51 really means that an endorsement purporting to be made by an agent shall only be effective if made by an authorized agent.

It is stated in Palmer's Company Law (9th ed., p. 44) that "if the articles provide that a bill of exchange to be effective must be signed by two directors, an outsider or anyone dealing with the company must see that it is so signed, otherwise he cannot claim under it."

The evidence in this case quite fails to establish that the endorsement on this note is that of the company, and thus fails to shew that the plaintiff is the holder.

The appeal should, therefore, be dismissed, with costs.

Appeal dismissed.

BRITISH COLUMBIA.

FEBRUARY 25TH, 1915.

COURT OF APPEAL.

OLYMPIC STONE CONSTRUCTION CO. LTD. v. MOMSEN & ROWE, ET AL.

Sale of Goods—Tug—"Barter" or "Sale"—Unregistered Boat—How Property in Transferred.

Where the purchase price of goods consists of cash and other goods the transaction is a *sale* and not a *barter* (IRVING, J.A., dissenting).

An unregistered boat may be validly transferred without a written document.

Per IRVING, J.A.:—A general manager of a company who *barters* certain property of the company when authorized by resolution only to *sell* may thereby by virtue of the powers of the company bind it quite apart from the written authority.

An appeal from the judgment of GREGORY, J., in favour of defendants in an action claiming the return of a tug purchased from the plaintiffs by defendants, Broley and Martin, and damages from defendants, Momsen & Rowe, for selling the boat without authority.

The appeal was heard by IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

T. S. Tait, for plaintiffs, appellants.

Bodwell, K.C., for Broley and Martin, respondents.

E. A. Lucas, for Momsen and Rowe, respondents.

IRVING, J.A.:—Plaintiffs (an incorporated company) were the owners of the tug boat "Rip Rap."

Momsen & Rowe were ship and yacht brokers, dealing in boats, and had a lien on the "Rip Rap" and her engine to secure the payment of two notes for $1,625.

When on the 10th November, 1913, the first of the two notes became due, Momsen & Rowe sent an agent (Maxon) to interview the plaintiff company, and at or after the interview, Maxon said that he thought the boat would suit Messrs. Broley & Martin, who were carrying on business on the Fraser River, and the following resolution was then passed:

"It was moved and seconded that Mr. Bowman be empowered to make, sign and transfer the company's interest and title to any parties who may hereafter purchase the company's boat. All copies of papers in connection therewith to be forwarded to the company's office at Victoria and any monies received by Mr. Bowman to be paid into the company's account at the Bank of Toronto, Victoria, and also that this motion in no way permits Mr. Bowman to enter into any agreements that may endanger the company's interests, except and for the sole purpose of effecting the sale of the boat. Carried."

Notice of this resolution was furnished to the defendants Momsen & Rowe by handing a copy to Maxon.

Bowman and Maxon took the "Rip Rap" from Victoria, where she was lying, to the Fraser River and shewed her to the other defendants, Broley & Martin. Broley & Martin were willing to buy her, but they had not sufficient cash; a three-handed deal was then arranged, by which Momsen & Rowe gave possession of the boat to Broley & Martin on the terms set out in the following document:—

"New Westminster, B.C.
"Dec. 2nd, 1913.

"Received from Messrs. Broley & Martin an accepted draft for $1,000 (one thousand) as part payment on gas tug, powered with a 35-h.p. Corliss engine. Sale price of tug to be $3,000 (three thousand dollars) clear from all debts. Momsen & Rowe agree to accept for balance of payment of $2,000 (two thousand dollars) certain machinery as described, shewn to, and passed on by Mr. Bowman, of the Olympic Stone Construction Co., of Victoria, said machinery to contain the following prices:—

"One hoisting engine ($1,500) 2 years old, used only 3 months;

"One swing gear ($245), 2 years old, never used:

"One set of derrick timbers, framed, and derrick irons complete ($500), 3 months old, never used;

all to be free from all debts, liens, mortgages, etc., and all of which are in first-class condition and located at Crane's shipyard, New Westminster.

"In the event of Messrs. Broley & Martin wishing to exchange their 35-h.p. Corliss engine for a larger one, Messrs. Momsen & Rowe agree to take back same within a period of

12 months from date, provided said engine is in perfect running order, and allow Messrs. Broley & Martin the list price of said engine, less 10% (ten) to be applied on part of purchase price on a larger Corliss engine, when purchased from Momsen & Rowe.

"Momsen & Rowe,
"per O. A. Momsen.

"Broley & Martin,
"Witness:
"E. Rice."

It will be observed that Momsen & Rowe did not forget their own interests in this contract under which they received the whole $1,000, payable in cash.

On 30th April, 1914, the plaintiffs brought this action claiming as against the defendant, Broley & Martin, the return of the "Rip Rap," and as against the defendants Momsen & Rowe damages for selling the boat without authority.

Momsen & Rowe counterclaimed for the $1,625. This counterclaim was dismissed without costs and without prejudice to the right of the defendants, Momsen & Rowe (or the bank which held the notes) to bring a fresh action in respect of the $1,625.

Judgment was given in the original action against the plaintiffs and from that judgment this appeal is taken.

Bearing in mind the fact that the defendants, Momsen & Rowe, were interested in the boat, and that they held two notes made by the plaintiffs for the price of the engine, the terms of the resolution, in my opinion, call for a sale for cash, and no authority was given to Bowman to make the barter, which was carried through by Momsen & Rowe. The inquiry addressed by Mr. Martin to Bowman as to his authority shews that he appreciated the applicability of the doctrine of caveat emptor.

The difference between a sale and a barter is well known and need not be enlarged upon. The cases cited by Mr. Bodwell will not justify us in calling an authority to an agent to sell an authority to barter. The legal effect of a contract of sale may be the same as that of a contract of barter, but the authority for one is not an authority for the other.

The plain reading of the authority given to Bowman was to sell for cash.

The implied authority of a factor does not include an authority to barter: Guerreire v. Peile (1820), 3 B. & Ald. 616; nor to delegate his authority: Cockram v. Islam (1814), 2 M. & S. 301; Solly v. Rathbone (1814), 2 M. & S. 298.

Apart from the written authority, I think we must hold that Bowman, who was the company's general manager, had power to bind the company: see Doctor v. People's Trust (1913), 18 B. C. 382; and clauses H. & O. of the company's powers and the power of delegation in sec. 91 of Table A., and, therefore, the plaintiffs are not entitled to recover.

The boat being unregistered might be transferred without a document in writing. The cases cited by Mr. Bodwell establish that point.

I would dismiss the appeal.

MARTIN, J.A.:—As to the point of this transaction being a sale or a barter, I am of the opinion that on the facts the learned judge below was justified in holding it to be the former. Hands v. Burton (1808), 9 East 349; Saxty v. Wilkin (1843), 11 M. & W. 623; 25 Hals. 109, par. 216. The case of Guerreire v. Peile (1820), 3 B. & Ald. 616, is of no assistance to the plaintiff in determining this question because there the transaction was stated in the written note to be "considered a barter transaction," therefore, it was not open to the parties to treat it otherwise.

Then as to there being a necessity for a written transfer of the vessel. It is admitted that she was not registered and it is not proved that she ought to have been, which the plaintiff should have done if he wished to bring her within the act; otherwise, a written instrument is not essential. Benyon v. Cresswell (1848), 12 Q. B. 900; cf. Erle, J. Of this case, it is said in MacLachlan on Shipping (1911), p. 32, that it is

". . . a decision which clearly implies that at common law the legal property in a ship may be transferred without a bill of sale; and there is no reason to suppose that the provisions of the Sale of Goods Act, 1893, with regard to the transfer of property as between buyer and seller do not apply to ships, except in cases where the Merchant Shipping Act makes a bill of sale necessary."

And cf. Batthyany v. Bouch (1881), 4 Asp. 380; 50 L. J. Q. B. 421, as to the Act of 1854 not applying to an agreement to transfer a registered ship, but to the instrument

of transfer itself, and that such an agreement may be enforced by an order for specific performance; cf. Act of 1894, secs. 24, et seq.

Applying the foregoing conclusion to the facts found by the learned trial judge (which finding is supported by the evidence), it follows that the appeal should be dismissed.

GALLIHER, J.A.:—I am, with some regret, I may say, forced to the conclusion that this appeal must be dismissed.

I think, upon the evidence and the authorities, that Bowman had power to make the deal, which, under the circumstances, seems to me not to have been in the best interests of the company.

MCPHILLIPS, J.A.:—This is an appeal from the judgment of Mr. Justice Gregory who, in my opinion, came to the right conclusion.

The action called in question the sale of an unregistered tug called the "Rip Rap." A sale was authorized by a resolution of the board of directors of the plaintiffs, and Mr. Bowman the managing director of the plaintiffs, was authorized to effect the sale and execute the necessary transfer of title thereof.

The learned trial judge has expressly found that the sale was made with the authority of the managing director, and with this finding I cannot find any good reason to disagree.

The evidence adduced at the trial to establish the plaintiffs' case is most unsatisfactory and it is impossible to take any other view upon it than that arrived at by the learned judge.

It was very strongly argued by counsel for the appellants that the present case was one which should have been determined upon the principle as laid down in Guerreire v. Peile (1820), 3 B. & Ald. 616-618 (22 R. R. 500), that is that the managing director had no authority to sell or authorize a sale save for money and that the transaction was one of barter and that therefore no property passed.

In my opinion the transaction was not one of barter. What is barter? In Stroud's Judicial Dictionary, 2nd ed., (1903), vol. 1, at p. 168, we find the following:—

"This word (barter) is used by us for the exchange of wares for wares (Termes de la Ley: Cowel)."

Chalmers' Sale of Goods, 7th ed. (1910), at p. 5:—

"Where the consideration for the transfer of the property in goods from one person to another consists of other goods, the contract is not a contract of sale but is a contract of exchange or barter (Bullen & Leake Prec. of Plead. 3rd ed., p. 151; Harrison v. Luke (1845), 14 M. & W. 139; French Civil Code Art. 1702). But if the consideration for such transfer consists partly of goods and partly of money it seems that the contract is a contract of sale (Alridge v. Johnson (1857), 26 L. J. Q. B. 296; Sheldon v. Cox (1824), where the goods had been delivered and the action was brought for the money balance. .. . .)"

Alridge v. Johnson, supra, was a case where 32 bullocks valued at £6 apiece were to be exchanged for 100 quarters of barley at £2 per quarter, the difference to be paid in cash and the contract was treated as a contract of sale.

Then in South Australian Ins. Co. v. Rendell ,(1869), L. R. 3 P. C. 101, the question as to what constituted a sale as compared with a bailment was considered, and Sir Joseph Napier at p. 108 said:—

"The law seems to be concisely and accurately stated by Sir William Jones in the passages cited by Mr. Mellish from his treatise on Bailments; pp. 64 and 102 (3rd ed.) Wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity and not for the return of this identical subject-matter in its original or an altered form this is a transfer of property for value—it is a sale and not a bailment."

And at p. 113 further said:—

"It comes to this that where goods are delivered upon a contract for a valuable consideration whether in money or money's worth then the property passes."

In the present case the transaction was clearly, in view of what has been declared to be the law, a sale—not a barter—the terms of the sale were $1,000, and machinery valued at $3,000, and there was sufficient acceptance and receipt to oust any possible contention on the part of the plaintiffs based upon the Statute of Frauds—and the property passed.

In my opinion, therefore, the learned trial judge arrived at the right conclusion and the judgment should be affirmed and the appeal dismissed.

Appeal dismissed.

BRITISH COLUMBIA.

FEBRUARY 26TH, 1915.

COURT OF APPEAL.

UNION ASSURANCE CO. AND SISTERS OF ST. ANN v. B. C. ELECTRIC RY. CO.

Fire Insurance—Fire Caused by Negligence of Third Party — Payment of Loss by Insurer to Insured — Equitable Assignment to Insurer of Rights of Insured Against Third Party—Subrogation—Right of Assignee to Bring Action in Own Name—Limitation of Actions—Consolidated Railway Company's Act (1896, ch. 55), secs. 44, 60.

Through the alleged negligence of defendant company a fire was caused which damaged the property of the Sisters of St. Ann who held a policy of insurance thereon. The insurance company made good the loss sustained to the Sisters who assigned to the former their rights against defendant company:—

Held, that the insurance company apart from the assignment was upon payment of the loss subrogated to the rights of the insured against the defendant company.

Held, that the assignment was equitable since notice had not been given to defendant company in accordance with the Laws Declaratory Act (R. S. B. C. ch. 133, sec. 2, sub-sec. 25), and that therefore the assignee must sue in the name of the assignor.

The defendant company had complied with the request of the Sisters for the supply of electricity under sec. 44 of the Consolidated Railway Company's Act (1896), ch. 55, declaring that "the company shall from time to time supply electricity to any premises lying within 50 yards of any main supply wire or cable suitable for that purpose on being required by the owner or occupier of such premises." The said damage was caused by the defendant company permitting a high voltage wire to come in contact with a low voltage wire leading into the premises of the Sisters. More than 6 months after the date of the fire the Sisters were added as co-plaintiffs:—

Held, that the compliance of defendant company with the request of the Sisters for a supply of electricity did not constitute a contract; that the action was one for "indemnity for damage or injury sustained . . . by reason of the works or operation of the company" under sec. 60 of the Act and that, by virtue of the said section, the Sisters, having brought their action more than six months after the date of the fire, could not succeed.

Crompton v. *B. C. Electric Ry. Co.* (1910), 43 S. C. R. 1; *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1: followed.

An appeal from the judgment of GREGORY, J. (29 W. L. R. 433) in favour of the plaintiff company and dismissing the claim of the plaintiffs, Sisters of St. Ann, in an action for damages for loss occasioned to the property of the Sisters

of St. Ann by fire caused by the alleged negligence of defendant company. Cross-appeal by Sisters of St. Ann.

The appeal was heard by MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

H. B. Robertson, for defendants, appellants.

Crease, K.C., for plaintiffs, respondents.

MACDONALD, C.J.A.:—The plaintiff company insured the Sisters of St. Ann against loss by fire. The defendant was at and prior to the time of the fire in the Sisters' convent out of which the plaintiffs' claim arises, supplying electric current to light the convent. The plaintiff company made good to the Sisters the damage, and obtained from them in writing an assignment of their rights against the defendant, and thereupon this action was commenced in the plaintiff company's own name within six months from the date of the fire. Subsequently, but more than six months after the date of the fire, the Sisters of St. Ann were added as co-plaintiffs but without prejudice to the defendants' right to take advantage of the limitation clause in its special Act. The learned judge who tried the action gave judgment in favour of the plaintiff company, and directed a reference to ascertain the damages, and dismissed the action so far as the Sisters of St. Ann were concerned, with costs.

The defendant appealed and the Sisters of St. Ann cross-appealed. Defendant's grounds of appeal may be shortly stated as follows, that (1) the claim of the sisters was not assignable; that (2) the plaintiff company had no right of action in its own name; that (3) the action in the sisters' name was barred by sec. 60 of the Consolidated Railway Company's Act 1896, being ch. 55 B. C. Statutes of that year; that (4) the plaintiff company's claim was also barred; and that (5) there was no legal evidence of negligence on defendant's part.

By their cross-appeal the Sisters claim to be reinstated and to have judgment in their favour if it should be held that their co-plaintiff could not sustain the judgment.

King v. Victoria Insurance Co., [1896] A. C. 250, disposes of the first ground in favour of the plaintiffs. That case also bears on the second ground of appeal. It was held under a contract of assignment or subrogation not distinguishable in its bearing on the point at issue from the one

here that the insurance company could recover from the tort feasor; in that case notice in writing of the assignment was given to the defendant, bringing it within the operation of a statute identical with sub-sec. 25 of sec. 2 of the Laws Declaratory Act, ch. 133, R. S. B. C., which enables an assignee who has brought himself within that statute to sue in his own name. In the case at bar, while the assignment was in writing, no notice in writing to the defendant was proved, and therefore the plaintiff company is not entitled to the benefit of the statute.

But there was an equitable assignment, and the failure to give notice merely affected the manner of recovery. Instead of suing in its own name the plaintiff company must sue in the name of the assignors: Dell v. Saunders (1914), 19 B. C. 500.

The learned judge appears to have been under the erroneous impression that a legal assignment in pursuance of the act had been shewn in this case. This may account for his having dismissed the Sisters and retained the plaintiff company.

But apart from the assignment, upon payment of the loss the plaintiff company was in law subrogated to the rights of the Sisters and entitled to bring this action in their (the Sisters') name: Simpson v. Thompson (1877), 3 App. Cas. 279.

The facts of the case at bar, with one exception, are identical with the facts in B. C. Electric Ry. Co. v. Crompton (1910), 43 S. C. R. 1. The defendants are the same; the legislation affecting the case is the same; each in its facts falls within sec. 44 of the said Consolidated Railway Act, which after providing that it shall be lawful for the company to contract for the supply of electricity to consumers for lighting purposes, declares that,—

"The company shall from time to time supply electricity to any premises lying within 50 yards of any main supply wire or cable suitable for that purpose on being required by the owner or occupier of such premises."

The section then proceeds to further provide that the company before complying with the request may require security for the costs of making the connection, for the payment of rates, and for rent of instruments.

In this case the contract (if any) for the supply of electric current is an implied one arising wholly from a request for the service and compliance therewith by the defendant, and payment of the rates from time to time by the sisters in the ordinary course of business. In Crompton's Case, and herein lies the distinction, it was the mother of the plaintiff who applied for and was given the service, not the plaintiff himself who was an infant living with his mother. In each case the injury was the result of the defendant's negligence, assuming for the moment that they were negligent in this case, in permitting a wire charged with a high voltage to come in contact with a low voltage service wire leading into the premises of the customer. The units of voltage in these respective wires were not proved, but the wires were spoken of throughout the evidence as the high voltage wire and the low voltage wire, or in terms of similar significance. The fact that there was no real dispute about the voltage in each perhaps accounts for the want of more definite evidence upon the point.

The circumstances therefore in these two cases are distinguishable only in this that in Crompton's Case the plaintiff was, as the majority of the court held, not the customer, and that therefore no contractual relationship existed between him and the defendants, whereas in this case the Sisters of St. Ann were the customers, and if no contractual relationship existed between them and the defendants it is because of the effect of sec. 44.

The defendants are not by law obliged to carry passengers. If they contract to carry a passenger they are subject to the common law obligations imposed upon carriers of passengers. To such a case sec. 60 has been held to be inapplicable: Sayers v. B. C. Electric Ry. (1906), 12 B. C. 102. Where there is no contractual relationship between the plaintiff and these defendants, and the injury is the result of defendants' breach of duty towards the plaintiff in operating its works, whether the tramway or the electrical supply branch thereof, the section is applicable—B. C. Electric Ry. v. Crompton, supra.

These authorities narrow the case down to the inquiry as to the effect of sec. 44 on the legal relationship of the parties. Apart from the section, on the facts of this case a contract, I think, would clearly be implied. The defendants' contention for which they claim the authority of Lyles v.

Southend-on-Sea Corporation, [1905] 2 K. B. 1, is that as the statute required them to supply the service to an applicant whose premises are within fifty yards of their main supply wire, their compliance with the request of the Sisters of St. Ann did not constitute a contract, and that this action is therefore one for "indemnity for damage or injury sustained . . . by reason of the works or operations of the company" to quote from sec. 60, and expressly within its protection. The court of appeal distinguished Palmer v. Grand Junction Ry. (1839), 4 M. & W. 749; and Carpue v. London & Brighton Ry. Co. (1844), 5 A. & E. 747, on the ground that the acts of incorporation of the defendants in those cases did not require the companies but merely enabled them to become carriers if and when they elected to do so, and that hence the actions were for failure in their duties as carriers under contract express or implied and were not for "any act done in pursuance or execution or intended execution of any Act of Parliament" (their special acts) so as to entitle them to the protection of the Public Authorities Protection Act 1893, from which I have just quoted, whereas in the case before them they thought that because the defendant's Light Railways Order, which had the force of a statute, requested them to provide a public passenger service on their tramways under penalty for default therein, the action was one arising out of an act done in pursuance of their said Light Railways Order, and must be commenced within the time limited by the Public Authorities Protection Act 1893. In other words, that an obligation was imposed beyond that which at common law attaches to carriers of passengers, viz: the obligation to carry passengers whether they wished to or not, and that hence the relationship between the carrier and the passenger was not merely contractual in its inception.

I think the doctrine of Lyles v. Southend-on-Sea Corporation, supra, must be applied to this case.

I can see no essential difference in principle between the two. There the defendants were under a statutory duty to accept Lyles as a passenger. Here the defendants were under a like duty to supply the Sisters of St. Ann with electricity. In each case the obligation to perform the duty without negligence is an obligation imposed by the common law. If therefore the action in Lyle's Case was one commenced against the defendants for negligence in connection with an act done

in obedience to the statutory mandate to carry the passenger, I cannot see any escape from the conclusion that this action was commenced for damages sustained by defendant's negligence in relation to the works or operations of the defendant. There appears to me to be no more nor less of the element of contract in the one than in the other, and what is perhaps of more importance there is in the one just as clearly as in the other the initial statutory obligation.

As the plaintiff company cannot support this action in its own name, and as the Sisters of St. Ann are in my view of the section barred, it follows that the appeal should be allowed and the cross-appeal dismissed.

It has thus become unnecessary to consider the 4th and 5tth grounds of appeal.

MARTIN, J.A.:—I agree with the judgment of the Chief Justice allowing the appeal for the reasons stated, only adding by way of precaution, in case the matter should go higher, that I do not wish it to be understood that there is not much also to be said in favour of another ground of appeal, viz.: that no negligence has in any event been established, the evidence, e.g., as to the current which was given in Crompton v. B. C. Electric Ry. (1910), 43 S. C. R. 1, having been omitted in this case.

GALLIHER, J.A.:—I think this is an action arising out of tort, and as the plaintiff failed to comply with the provisions of sub-sec. 25 of sec. 2 of the Laws Declaratory Act, being ch. 133 R. S. B. C. 1911, no notice in writing having been given of the assignment, the plaintiffs cannot maintain the action in their own name.

When the Sisters of St. Ann were added as a party it was too late as the action was then barred by sec. 60, ch. 53, B. C. Statutes 1896: Crompton v. B. C. Electric Ry. Co. (1910), 43 S. C. R. 1.

The appeal shall be allowed.

IRVING, J.A., concurred with MACDONALD, C.J.A.

Appeal allowed; cross-appeal dismissed.

BRITISH COLUMBIA.

FEBRUARY 26TH, 1915.

COURT OF APPEAL.

RITCHIE CONTRACTING CO. v. BROWN, ET AL.

Interpleader—Appeal—County Courts Act, sec. 116—County Court Rules 1912, Order 13, r. 10—Validity of Seizure Under Execution as Against Mortgagee—Defective Chattel Mortgage—Apparent Possession.

An appeal lies without leave from the order of a county court judge disposing of an interpleader action on the merits pursuant to the power conferred by County Courts Rules 1912, Order 13, r. 7 where the amount involved is $100 or over by virtue of sec. 116 of the County Courts Act, County Court Rule 10, Order 13, being inconsistent with the said statutory provision. (MCPHILLIPS, J.A., dissenting).

A seizure of a chattel while in the lawful possession of a judgment debtor as apparent owner is valid as against a mortgagee under a defective chattel mortgage, who had not actual possession, it being immaterial that the mortgagee diligently attempted to obtain possession.

***Ex parte Jay* (1874), L. R. 9 Ch. 697, followed.**

An appeal by the claimant from the judgment of His HONOUR JUDGE GRANT upon the hearing of an interpleader issue ordered by consent to be tried summarily under Order 13, r. 7, of the County Court Rules, 1912.

The appeal was heard by MACDONALD, C.J.A., IRVING and MCPHILLIPS, JJ.A.

Charles Macdonald, for claimant, appellant.

Ladner, for plaintiff, respondent.

MACDONALD, C.J.A.:—A preliminary objection was taken at the hearing of this appeal that as the interpleader action had been tried by the learned judge and disposed of on the merits pursuant to power given in that behalf by Order 13, r. 7, of the County Court Rules, 1912, and as no leave to appeal was given by the learned judge, the appeal should be quashed. The respondents rely on r. 10 of said Order 13 in support of this contention.

The English Common Law Procedure Act, 1860, secs. 14 and 15, like our County Rules 7 and 8, Order 13, enabled a judge to dispose summarily of claims in interpleader matters, and sec. 17 of the same Act provided that:—

"The judgment in any such action or issue as may be directed by the court or a judge in any interpleader proceedings and the decision of the court or judge in a summary manner shall be final and conclusive against the parties and all persons claiming by, from, or under them."

Although all the other provisions of the Common Law Procedure Act, including said secs. 14 and 15, were repealed, sec. 17 above quoted was allowed to remain in force. Secs. 14 and 15 now appear in the form of Rules of the Supreme Court, Order 57, rr. 8 and 9, and correspond to said County Court Rules 7 and 8. But while said sec. 17 remained unrepealed, it was with certain changes incorporated in the Rules of Court, where it appears as r. 11, Order 57 in the same words as our County Court Rule 10, Order 13.

The effect of these rules and statutes on the right of appeal has been considered in a number of cases, including Waterhouse v. Gilbert (1885), 15 Q. B. D. 569; In re Tarn (1893), 2 Ch. 280; Lyon v. Morris (1887), 19 Q. B. D. 134; Bryant v. Reading (1886), 17 Q. B. D. 128; Van Laun v. Baring, [1903] 2 K. B. 277; Cox v. Bowen, [1911] 2 K. B. 62; Mason v. Boltons, Ltd., [1913] 1 K. B. 83.

Lindley, L.J., In re Tarn, supra, speaks of Rule 11 at p. 284, as follows:—

"Rule 11 is difficult to work out in practice, but the introductory words make the rule not applicable where it would be inconsistent with any statutory provisions as to the finality of the order. We have then to look out of the rules into the statutes and when we look at the statutes we find that an order made summarily by a judge in interpleader proceedings is not appealable."

In this province the statute law applicable to a case like this is materially different from that of England. We have no statutory provision such as sec. 17 of the Common Law Procedure Act, which takes away the right of appeal, but on the contrary we have sec. 116 of the County Courts Act which gives a right of appeal from all judgments or orders whether final or interlocutory in interpleader proceedings where the amount involved is $100 or upwards. As to such judgments or orders it is "otherwise provided by statute" that they shall not be final but may be appealed without leave. It would therefore follow that leave need be obtained only where the amount involved is less than $100.

The value of the property involved in this appeal is above that sum, and hence the preliminary objection must be disallowed with costs.

On the merits I concur in the conclusion and reason therefor of my brother Irving.

IRVING, J.A.:—I agree with the opinion just read that the motion to quash should be dismissed.

The plaintiff company having recovered judgment against Pratt and caused a motor car to be seized under the warrant of execution, the claimant, Charles Brown put in a claim to the car under a chattel mortgage, and in the alternative upon having taken actual possession of the car.

The sheriff obtained an interpleader order and the learned County Court Judge held the chattel mortgage was bad because of a defective affidavit, and he found that whatever possession the claimant might have had for a short time after the execution of the chattel mortgage of 4th November, he had parted with voluntarily, on or about 25th December, and allowed the debtor to hold himself out from 25th December till 27th March as the ostensible owner of the car.

Brown now appeals on the ground that the possession taken cures the defects in the chattel mortgage. His contention is that the car was not in possession or apparent possession of Pratt.

When the mortgage was given the car was kept in the Tudhope Garage on Granville Street. After the mortgage was given it was put into the claimant's garage on 14th Avenue.

Just before Christmas, about 22nd December, Pratt obtained permission to use the car, as he had some friends who were coming over for Christmas. He took it away and the inference I draw is that he kept it and used it for some time. Pratt promised to return it to the claimant but no time for its return was specified. It does not appear that it was ever returned to the claimant's garage. The claimant says he knew nothing about the car till some time in January when he learned it was in a public garage on 13th Avenue, where it had been placed for repairs, having, I infer, been injured while in Pratt's possession. At any rate the claimant was no party to the ordering of the repairs, nor to the placing the car in the 13th Avenue garage. It stayed there until the seizure, the claimant taking the portion it was the duty of the man who damaged the car to put it in good condition,

and "put it back again" that is, into his garage on 14th Avenue.

Our section defining apparent possession is taken from the English Bills of Sale Acts, 1854 and 1878 (41 and 42 Vic. ch. 31, sec. 4), which were intended to prevent false credit being given to people allowed to remain in possession of goods which apparently are theirs, the ownership in which they have parted with. That I think was what was done in this case. Pratt was permitted by the claimant to use and enjoy the car apparently as owner, from 22nd December certainly until the time of the discovery of the car in the 14th Avenue garage. As to the possession of the car after the interview between the claimant and the proprietors the case raises a nicer question. Here we have third persons in possession—who had received it from Pratt; but these third persons though indifferent to the ownership of the car, never attorned, or agreed to hold the car as agent for the claimant. There could not be concurrent possession of the car so I think the third parties must be regarded as the holders for the person who left the car with them.

According to the general rule that one who has recovered property from another as his bailee, or agent, or servant must restore or account for that property to him from whom he received it. The obiter dicta in reference to the meaning of the word possession under the Bills of Sale Act reported in Ancona v. Rogers (1876), 1 Ex. D. at pp. 292 and 293, are against the claimant; and see In re Wood (1879), 40 L. T. 104.

The leading case on apparent possession is Ex parte Jay (1874), L. R. 9 Ch. 697. It is there laid down that if the mortgagee does not actually get possession diligence in attempting to get it will not help him. Pratt having undoubted possession I think it must be incumbent on the claimants to regain possession—to do something more than merely discuss with the third party the terms on which he might remove the car.

I would dismiss the appeal.

McPHILLIPS, J.A. (dissenting):—This is an appeal from a judgment pronounced by His Honour Judge Grant upon the hearing of an interpleader matter ordered by consent to be tried summarily under Order XXVI., r. 7.

In the argument reference was made to the County Court Rules, 1905, Order XXVI., rr. 7 and 10, the County Courts

Act (ch. 53 R. S. B. C. 1911), secs. 116 (d), 119, and 165, and the Court of Appeal Act (ch. 51 R. S. B. C. 1911), sec. 6 (3), (4), and it was urged that there was the right of appeal notwithstanding that it was admitted that no special leave to appeal had been obtained.

In my opinion the County Court Rules—Marginal No. 461 (Or. XXVI., r. 10), which has the force of statute law —vide secs. 162 and 165 of the County Courts Act—is conclusive and no right of appeal can be claimed in the present case unless leave be first had and obtained.

It would seem to me that there was in the present case a decision of the judge in a summary way—although it is true an order was made directing the summary hearing—a quite unnecessary order—but not to my mind of such potency as to change the character of the hearing—and that which is appealed from is the summary disposition of the whole matter—which in my opinion is only appealable with leave—Van Laun & Co. v. Baring Bros. (1903), 72 L. J. K. B. (C.A.), 756.

The case which is absolutely in point—and it determines the further point that even with leave there is no appeal in England by reason of sec. 17 of the Common Law Procedure Act, 1860 (Imperial)—is Harbottle v. Roberts (1905), 74 L. J. K. B. (C.A.), 310. It was in that case pointed out by counsel for the claimant who took the preliminary objection that no appeal lay, that "The order of Bray, J., did not actually decide the claim summarily but directed it should be so decided." In the present case the order of the 20th April, 1914, made by the learned judge, recites that it is an order by consent and that the question as to whether at the time of the seizure the goods were the property of the claimant as against the execution creditor should be tried summarily on the 23rd of April, 1914, and was so disposed of on that date. Collins, M.R., in giving judgment in Harbottle v. Roberts, supra, at p. 311, said:—

"I am of opinion that the preliminary objection is a good one, and must be allowed. The case of Bryant v. Reading, 55 L. J. Q. B. 235; 17 Q. B. D. 128, shews that a decision upon an interpleader summons to dispose of the matter in a summary manner, under Order LVII., rule 8, is the same thing as a summary decision itself. Here the Master decided to deal with the matter summarily, and that decision was the same thing as a summary decision within the rule. But it is said that, inasmuch as the value of the goods claimed

was over £50, the case is governed by a rule of practice according to which neither the Master nor the judge had any jurisdiction to order that the matter should be decided in a summary manner. To my mind it is clear that this rule, if it does exist, has never been anything more than a mere rule of practice. It does not control the provisions of the statutory rules, and cannot, because the subject matter is over £50, exclude the jurisdiction of the Master or the judge to decide the dispute in a summary manner. It is suggested that something which I appear to have said in Van Laun & Co. v. Baring Brothers & Co., 72 L. J. K. B. 756; (1903) 2 K. B. 277, is to the contrary of this. It seems to me, however, that that case really confirms what I am now saying, for it shews that a mere rule of pracice cannot limit the substantive provisions of statutory rules. The authority of Bryant v. Reading is therefore in point, and shews that no appeal lies to this court. The fact that the learned Judge at Chambers gave leave to appeal cannot take the case out of the rule which prohibits an appeal. This was the very point decided in Van Laun & Co. v. Baring Brothers & Co."

It is true the Common Law Procedure Act (Imperial), 1860, sec. 17, cannot be said to be the law with us, but the statute law was equally effective as to the point under consideration on the 19th day of November, 1858. The English Law Act (c. 75, R. S. B. C. 1911) as at that time the Interpleader Act (Imperial), 1 & 2 Will. 4, c. 58, was in force in England, and where there was consent as in the present case and the matter being disposed of summarily there can be no appeal. Curlewis v. Pocock, 5 Dowl. P. C. 381; Harrison v. Wright, 13 M. & W. 816; and Shortridge v. Young, 12 M. & W. 5.

Quite apart from the Interpleader Act (Imperial), 1 & 2 Will. 4, c. 58, and to the perhaps somewhat reasonable contention that it is now inapplicable, in my opinion, the statute law as we have it and the Rules which have the force of statute law preclude an appeal in the present case.

I admit that the question is indeed one of complexity and the decisions which have been given from time to time have given rise to understandable variance of opinion. However, upon the facts of the present case, the consent itslf to a summary disposition of the matter is conclusive, and in my opinion there is no appeal.

Appeal dismissed; McPHILLIPS, J.A., *dissenting.*

THE

Western Law Reporter

VOL. XXX. TORONTO, MARCH 29, 1915. No. 14

BRITISH COLUMBIA.

FEBRUARY 26TH, 1915.

COURT OF APPEAL.

NEPAGE v. PINNER ET AL.

Mechanics' Lien—R. S. B. C. 1911, ch. 154—Sub-Contractor —When Lien Attaches—Completion of Contract.

Where a sub-contractor undertakes to do a certain work for a lump sum without any stipulation as to payment before completion a lien does not attach until the completion of the sub-contractor's work, and if there is no money then due from the owner to the contractor the sub-contractor's lien fails by virtue of sec. 8 of the Mechanics' Lien Act (R. S. B. C. 1911, ch. 154).

Appeal from the judgment of LAMPMAN, Co.C.J., in favour of defendants in a mechanics' lien action.

The appeal was heard by MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Moresby (McDiarmid with him), for plaintiffs, appellants.

Crease, K.C., for Victoria Opera House Co. Ltd.

Jackson, for Hannington, mortgagee.

MACDONALD, C.J.A.:—The plaintiffs claim a mechanics' lien against the property of the Victoria Opera House Co. Ltd., as owners, and others as encumbrancers. In the view I take of the case no question arises with respect to the encumbrancers. The Opera House Co. let an entire contract for the erection of their opera house to the defendants Pinner & McLennan, with whom plaintiffs contracted for the

installation of the electric plant for the lump sum of $14,000. When the opera house was nearing completion, namely on the 28th January, 1914, the owners made a payment of $50,000 to the contractors, leaving a balance of what the contractors claim would be due them on completion of about $15,000.

There is no evidence that on the 28th January the plaintiffs had completed the work under their sub-contract. We were referred to an item in a time-slip dated 26th January as evidence of the last work done on the sub-contract, but that time-slip is not verified, nor is there any evidence that in fact that item was the last item of work done under the sub-contract. I must therefore accept the only real evidence of the fact of completion, and it is to be found in the plaintiffs' letter of the 16th February, in which they declare that they had finished the work, and the certificate of the owners' architect of the same date verified that claim. The fact therefore is not disputed that on that date the plaintiffs had completed their sub-contract and the extra work which they had undertaken, and which is not in question in this appeal.

The said sub-contract provides for payments by the contractors during the progress of the work, and there is no evidence that anything was due or unpaid under the terms thereof on the 28th January.

Upon being paid the said sum of $50,000, the contractors abandon the work, and the building, it is admitted, is not yet completed. It is not seriously contended therefore that there was after the payment of the 28th January anything due or payable by the owners to the contractors.

These facts lead to the question did a lien attach in favour of the plaintiffs before the $50,000, was paid to the contractors? If so, then I think it would be enforceable notwithstanding that at the time of the filing of the lien in question in this action, namely, the 17th February, 1914, nothing was then due or payable by the owners to the contractors.

As I read the Mechanics' Lien Act, the lien of a wage-earner under a daily hiring would attach on the completion of the day's work, and so from day to day. The lien of a contractor or sub-contractor would attach when he had completed his contract, or if the contract provided for interim payments on account, a lien would attach when each payment became due or payable to the extent of the amount thereof.

In the case of the sub-contract in question, aside from the provision for progress payments on account, no part of the contract price might ever become payable. Until the contract should be substantially completed the payment of the price would be contingent. I think a lien cannot attach in respect of money not payable, and which may never become due or payable.

In the absence therefore of evidence that either the whole or some part of the contract price was at the time of the payment of the said sum of $50,000, due or payable to the plaintiffs, in other words, that their right to it was no longer contingent, they cannot rely upon that sum or any part of that sum as being a sum payable from the owner to the contractor in respect of which a lien in their favour attached.

On the 16th February when a lien might have attached had there been moneys payable by the owners to the contractors, there were none such, hence the plaintiffs cannot in my opinion succeed.

The appeal should be dismissed.

GALLIHER, J.A.:—The plaintiffs here are sub-contractors for the electrical wiring and fixtures in the Victoria Opera House Co. Ltd., against whose property they have filed a lien.

Their contract with the contractor provided that they should be paid upon architects' certificates 75 per cent. monthly as the work progressed.

No certificates were issued except the final certificate of acceptance dated February 16th, 1914, so that at the time the $50,000, was paid by the Opera House Co. to the contractors on January 28th, 1914, there were no outstanding progress certificates issued by the architects shewing any amounts payable to the sub-contractors, in fact the architects say they had nothing to do with the sub-contractors as to issuing certificates.

In the statement given the Opera House Co. by the contractors, dated 21st January, 1914, and upon which the sum of $50,000, was advanced to the contractors on January 28th, there is nothing to shew that there was any money due these sub-contractors unless the item No. 4, $2,194, electrical extras, refers to the plaintiffs, but even if that is so the plaintiffs abandoned their appeal as to extras.

In the evidence of Mr. Matson and Mr. Elliott, two of the directors of the Opera House Co., they admit that the

sum paid ($50,000) was upon the representation of the contractors that they must have money to pay off the sub-contractors who were waiting at their door, as the bank would not advance them any more, and it was upon these representations that the money was advanced.

This payment of $50,000, was, as I view it, an acknowledgment by the Opera House Co. that on the date January 28th, 1914, they owed that amount to the contractors, the balance being left for adjustment.

Now if the plaintiffs' lien had attached at or prior to the making of this payment they are entitled to have it enforced —as there was on that date moneys in the hands of the company due the contractors more than sufficient to cover plaintiffs' claim.

Where a sub-contractor undertakes to do certain work and supply materials for a lump sum without any stipulation as to payment before completion, I take it his lien would attach only on completion of his work and if there was no money then due from the owner to the contractor under our Mechanics' Lien Act, sec. 8, his lien must fail.

That was decided by this court in Fuller v. Turner (1913), 18 B. C. 69, and in Rosio v. Beach (1913), 18 B. C. 73.

The affidavit of McKenny of the plaintiffs' firm shews that up to December 12th, 1913, they had received on account of their contract $8,280, and as there is no evidence before us of any estimates of work done under the contract up to that time, it may be that this amount represented the full 75 per cent. of the value of work done, so that I fail to find evidence that there was money due plaintiffs under progress estimates, but if the plaintiffs have shewn in their evidence that the work under their contract was completed (I exclude extras) before the payment over of the $50,000, on January 28th, 1914, then the lien for the balance unpaid would attach.

If the question had been asked plaintiffs' witnesses—Was the work done under your sub-contract (not including extras) completed before payment over to the contractor on January 28th? there would have been direct evidence one way or the other, but instead of this the court is left to wade through a mass of tangled evidence and asked to find from that whether it was so completed.

Turning to exhibit 59, p. 239 and 240 A.B., we find the following lettter:—

"Victoria, B.C.
February 16th, 1914.

"Messrs. Rochfort & Sankey,
Victoria, B.C.

re Victoria Theatre.

"Gentlemen:—We beg to state that we have finished the electrical installation work on the Royal Victoria Theatre, according to plans and specifications; also all extras ordered through yourselves and the agents of the Victoria Theatre Co. If at any future date inferior materials, or defective work, under our contract, should appear, we shall, on notice from yourselves or the Victoria Opera House Co. make same good at our expense.

"Hoping to receive your written acceptance of the job, we are,

Yours very truly,
Nepage, McKenny & Co.
By

And the architects' certificate in reply:—

"W. D'O. Rochfort - - - E. W. Sankey
Associate Architects
505-506 Union Bank Bldg., Victoria, B.C.
A. S. Kendle, Manager. Phone 1804.

February 16th, 1914.

"Messrs. Nepage McKinney Co.,
Electrical Contractors,
Seattle, Wash.

"Gentlemen:—This is to certify that we have inspected the electrical installation in the Royal Victoria Theatre, and hereby accept same as satisfactory, in accordance with your letter to us of even date.

Yours truly,
W. D'O. Rochfort & E. W. Sankey.
per A. S. Kendle,
Manager."

Standing alone these point to a completion on February 16th, 1914, but if there is sufficient other evidence to shew that notwithstanding these were dated as above, as a matter

of fact the work under the plaintiffs' main contract was completed before January 28th, 1914, then their lien should attach.

The only evidence we have been directed to is on p. 237 A.B., where in the statement filed, exhibit 14, there is eight hours work charged to job No. 683 (which is sworn to as the job number under the contract, the other numbers having reference to extras) and eight hours work to the same number on the 26th of the same month.

Counsel states that this was the last work done under the contract, but none of the witnesses have said so and we are asked to infer that such is the case simply because there appears in the material before us no later entry of work charged to that number.

I think it would be dangerous to so assume, and that the plaintiffs have failed in shewing that their work under the contract was completed, or that there was anything due them, so that their lien would attach at the time the $50,000 was paid over.

The plaintiffs' appeal must fail.

McPHILLIPS, J.A.:—In my opinion the appeal must be dismissed. I entirely agree with the learned trial judge. It is amply clear upon the evidence that there is no sum due or payable to the contractors. The case is one of non-completion of contract by the contractors, and in my opinion sec. 8 of the "Mechanics' Lien Act" (ch. 154 R. S. B. C. 1911) precludes the establishment of the claimed lien. The cases which in my opinion support the conclusion at which I have arrived are the following: The S. Morgan Smith Co. v. The Sissiboo Pulp and Paper Co. (1904), 35 S. C. R. 93; Farrell v. Gallagher (1911), 23 O. L. R. 130; Fuller v. Turner & Beech (1913), 18 B. C. 69; Rosio et al. v. Beech et al. (1913), 18 B. C. 73; Fitzgerald et al. v. Williamson et al. (1913), 18 B. C. 322.

Appeal dismissed.

MANITOBA.

FEBRUARY 25TH, 1915.

COURT OF APPEAL.

RE FORTUNE ESTATE.

Trusts and Trustees—Interim Allowance—Trustee Act (R. S. M. ch. 200, sec. 52.)

It is wrong in principle to allow to an executor or trustee moneys that are to be earned in the future or which may never be earned, and the fact that the executor or trustee is a strong company and likely to be permanent does not alter the said principle.

Upon an application under the Trustee Act (R. S. M. ch. 200, sec. 52) for interim remuneration the court may allow an executor or trustee a reasonable sum on account, without expressing any opinion as to the amount which has actually been earned by the executor or trustee up to the time of the said application.

An appeal by the beneficiaries from the order of the Judge of the Surrogate Court of the Eastern Judicial District granting an interim allowance to an executor under the Manitoba Trustee Act (R. S. M. ch. 200, sec. 52).

The appeal was heard by RICHARDS, PERDUE and HAGGART, JJ.A.

J. B. Coyne, for the beneficiaries, appellants.

Sir James Aikins, K.C., and E. Loftus, for executor, respondent.

RICHARDS, J.A.:—By an order made on the application of the executor company, the learned judge, whose decision is appealed against by the beneficiaries, has granted to that company $44,000 as an interim allowance, with a proviso that, when the trust is ended, the whole question of remuneration is to be determined without regard to the above order, and has provided that such allowance shall be without prejudice, in any way, to such determination, and that, "according as the amount of remuneration so finally determined shall exceed or fall short of the amount chargeable and charged to the said estate hereunder, the executors and trustees shall be paid out of the estate, or shall repay to the estate, as the case may be, the difference."

With much deference, I am obliged to dissent from the learned judge's method of dealing with the matter.

The trust may last for a number of years. Yet he has granted, as an interim allowance, a sum that he apparently thinks will cover future services of the company, and may even chance to exceed the total remuneration that may be earned in all their dealings, past and future, with the estate until, and including, the winding up of the trust.

It is, I submit, wrong in principle to allow to an executor, or trustee, moneys that, as contemplated by this order, are to be earned in the future, or which he may never earn. The fact that, in the present case, the executor and trustee is a strong company, and likely to be a permanent one, makes no difference in the principle involved.

Apart from the above, I am unable to agree with the learned judge as to the amount to be allowed. The estate is a large one, and the question of the amount involved is necessarily one of the things to be considered in settling the measure of compensation. On the other hand I cannot but think, after hearing the argument and examining the material before the court, that, for so large an estate, the difficulties in handling it have been unusually few and small.

The only proper allowance to be made to the executor and trustee at this stage is necessarily an interim one.

What should now be allowed is merely a reasonable sum, without, in any way, committing the court as to the remuneration to be ultimately allowed when the trust ends.

Whether, on the final distribution of the estate, such a sum as the learned judge has fixed may be considered as the total remuneration, need not now be discussed, as what may have to be done in the future is unknown. But at this stage I think that $10,000 is enough to allow as an interim allowance, without going into the question whether that sum has been actually yet earned, the material before the court being, in my opinion, insufficient to enable us to finally settle that point.

I would allow the appeal, and alter the order appealed from by striking out the words "forty-four thousand dollars ($44,000)" where they occur therein, and by substituting therefor the words, "ten thousand dollars ($10,000)."

I would allow the beneficiaries their costs of this appeal, as between solicitor and client, to be paid out of the estate, and allow no costs of the appeal to the executor company.

PERDUE, J.A.:—I agree that the amount to be granted to the executors on account of the remuneration should be reduced to $10,000. In fixing that sum it should be distinctly understood that this court expresses no opinion as to the amount that had actually been earned by the executors up to the time the application for interim remuneration was made. The material before the court was not sufficient to enable it to arrive at a definite conclusion in regard to the full extent of the services that had up to that time been rendered, or the amount that should be allowed in respect of them. The whole question of remuneration will have to be considered and dealt with when the estate shall have been completely administered, and when the judge dealing with the matter shall have before him the executors' accounts, full particulars as to the value of the assets of the estate, the disposition made of them, the work involved, and all the other facts and circumstances to be taken into account on such an application. The present decision is to be taken as one simply allowing a payment on account without expressing any opinion as to the amount which should be ultimately awarded.

HAGGART, J.A.:—Under the Manitoba Trustee Act, R. S. M. ch. 200, sec. 52, an application was made to the Judge of the Surrogate Court of the Eastern Judicial District of the province of Manitoba by the Standard Trusts Co. and the judge allowed the sum of $44,000 as a fair and reasonable interim allowance for its care, pains, trouble and time expended in and about the administering, arranging and settling the affairs of the estate up to the 30th day of September, 1913.

I can understand the desire of the executive of a trust company to shew to the shareholders profitable operations and good financial results. I appreciate the fact that such companies are in a position to do the business of a trustee better than private individuals, that they have in their employ competent officials and experts, that they are perpetual in their existence and they can give to the public good security for the money and property coming into their custody.

I cannot, with all due respect, find, however, any good reason for supporting the order of the Surrogate Court Judge. I think the amount is excessive. If the courts affirmed such an order then it would be the duty of the Legislature to interfere and regulate the compensation. If the

Legislature did not interfere, then testators would give trust companies a wide berth and direct in their wills that their estate should be administered by their friends and relatives as in former days when there were no trust companies.

It is not necessary at this stage to consider whether the compensation should be computed by percentage on the gross valuation or otherwise. That can be determined when the trust has been executed and when it can be better ascertained what care, pains, trouble and time has been expended in and about the trusteeship.

In the meantime I think less than one-fourth of the amount allowed by the Surrogate Court Judge, say $10,000, would be a generous sum by way of an interim allowance.

I would allow the appeal and amend the order of the Judge of the Surrogate Court by substituting for $44,000 the sum of $10,000.

Appeal allowed.

BRITISH COLUMBIA.

FEBRUARY 26TH, 1915.

COURT OF APPEAL.

RE BANKERS TRUST AND BARNSLEY.

Company — Winding-up — Non-compliance with Articles of Association in Creation and Issue of Shares—Contributories.

Judgment of GREGORY, J., 29 W. L. R. 479, affirmed.

The appeal was heard by MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Maclean, K.C., for plaintiff, appellant.

H. B. Robertson, for defendant, respondent.

MACDONALD, C.J.A.:—I agree with the conclusion arrived at by the learned trial judge, and therefore would dismiss the appeal.

IRVING, J.A.:—The learned judge came to the conclusion that this case came within the principle of Re Packenham Pork Packing Co. (1906), 12 O. L. R. 100. I agree with him.

The effect of the 46th section on the resolution of 12th August, 1912, was, in my opinion, to create so many more common shares—the "original issue" in 1909 being all common shares.

Mr. Barnsley's application was for preference shares, and as there were no preference shares to allot to him, there was no meeting of the minds and therefore no contract. Had he searched the memorandum and articles of association as he was bound to to do (Oakes v. Turquand (1867), L. R. 2 H. L. 325, 36 L. J. Ch. 949) he would have learned that the company had power to issue preference shares. He would not have learned from these documents that all the preference shares had been allotted before he made his application. That fact he could only learn by going through the books of the company—but he was not bound to examine them.

The creditors are entitled from the date of the winding-up order to be regarded as being to the extent of their claims, purchasers for value of the company's rights against its members—but they can have no greater rights than the company has. You cannot fix upon a person any engagement larger, or other than that he entered into. Barnsley never knowingly agreed to accept common shares.

The cases cited on behalf of the liquidator are instances of applicants being held liable, on voidable contracts on the ground of acquiescence, because they knew or ought to have known: see Beck's Case (1874), L. R. 9 Ch. 392, 43 L. J. Ch. 531; but those cases have no application in deciding a case of mistake and no acquiescence.

I would dismiss the appeal.

MARTIN, J.A.:—Briefly, in my opinion the combined effect of Articles 5 and 46 as applied to the question before us, is that in default of any "directions" being given under sec. 46 as to the new shares the directors can only deal with them as common stock under the "original capital," unless they obtain the sanction of the company by special resolution under sec. 5, which was not done. These facts, it is contended, bring this case within the decision of the Ontario Court of Appeal in the very similar case of Re Packen-

ham Pork Packing Co. (1906), 12 O. L. R. 100, and I am unable to distinguish that case in principle, because it is stated therein, p. 109, that:—

"The by-law and the subsequent sanction of the shareholders are the essential elements of the power to create the preference stock. The power is not otherwise conferred, nor is it inherent in the directors of the company. It is not a question of mere form, for the form in this instance is matter of substance. In this case there was a complete failure to comply with the provision of the Act as regards the passing of a by-law, the first prerequisite to the creation of preference stock."

It is true that sec. 22 of the Ontario Companies Act after giving the directors power to create and issue preference stock by by-law provides that no such by-law shall have any force or effect whatever unless it has been unanimously sanctioned by a vote of the shareholders at a general meeting duly called for that purpose, but in my opinion acts of directors which are wholly unauthorised unless performed in compliance with the articles stand on no higher a plane than those which are declared by the Act to be ineffective because of non-compliance.

In some respects this is a weaker case than Pakenham's because there at least the unanimous consent of a meeting had been obtained to create preference stock of a fully prescribed nature, and though the matter had been irregularly brought before it as it was not a meeting called for the special purpose, yet still there was some justification for the belief of the directors that the company approved their intended course, though the directors failed to observe the act and pass a by-law and get it sanctioned. But in the case at bar the directors never even attempted to create any preference stock of the new capital or to define its nature or privileges, or to obtain any sanction therefor, but simply presumed to deal with it all as "ten per cent. preferred shares," without any further definition thereof, (whatever that uncertain language may be held to mean) though the nature and various privileges of the original preferred shares had been clearly defined by them. It may be, as alluded to in Pakenham's Case at pp. 108-9, that the company could not repudiate these shares as against certain holders but that is no answer to the objection of Barnsley to being placed on the

list of contributories, and on the facts I find no difficulty in saying as the court said in that case, p. 109:—

"Here there is no acquiescence, delay, or conduct on (Barnsley's) part to estop him from alleging and shewing that at the time when he made his application, and thence forth until the liquidation proceedings, the company were not in a position to give him that for which he applied. There was no concluded contract, and he never received or became the holder of shares of the nature and quality specified in the application or any others."

It may be as suggested that the Ontario Court of Appeal came to an erroneous conclusion in that case, but I prefer to follow it leaving it for a higher tribunal to finally determine the question.

For these reasons I think the appeal should be dismissed.

GALLIHER, J.A.:—I concur in the reasons for judgment of my brother Irving.

Appeal dismissed.

BRITISH COLUMBIA.

FEBRUARY 26TH, 1915.

COURT OF APPEAL.

LEDINGHAM ET AL. v. SKINNER ET AL.

Evidence—Claim Against Estate of Deceased Person—Corroboration — Wife — Joint Claimants — Evidence Act (R. S. B. C. ch. 78, sec. 11).

Where a husband made a claim against the estate of the deceased uncle of his wife for board and lodgings furnished to the said uncle it was *held*, that the wife was an opposite or interested party and that her corroboration of her husband's claim did not satisfy sec. 11 of the Evidence Act.

Thompson v. *Coulter* (1903), 34 S. C. R. 261, referred to.

Where two people make a joint claim against the estate of a deceased person, sec. 11 of the Evidence Act requires independent corroboration in addition to that supplied by each telling the same story as the other.

Varasseur v. *Varasseur* (1909), 25 T. L. R. 250, followed.

An appeal from the judgment of HUNTER, C.J.B.C., of the 23rd June, 1914, in favour of the defendants.

The appeal was heard by MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

F. C. Elliott, for plaintiffs, appellants.

D. S. Tait, for defendants, respondents.

MACDONALD, C.J.A.:—In my opinion the evidence is not such as to warrant the reversal of the judgment appealed from. It does not satisfy me that either David Hoggan or William Hoggan contracted to pay for the board and lodging which formed the basis of the plaintiff's claim. The plaintiff's wife, afterwards added as a co-plaintiff with her husband, R. L. Ledingham, was the adopted daughter of David and William Hoggan. It was therefore quite natural that David and William Hoggan should be entertained as a guest by the plaintiffs. The frequency and length of David Hoggan's visits have, I am satisfied, been very greatly exaggerated. Even if the evidence of the one plaintiff can be admitted as corroborative of that of the other, as to which I find it unnecessary to express an opinion, the whole is so unsatisfactory as to justify a refusal to give effect to the plaintiff's claim against the representatives of the deceased persons.

Subsequent events militate very greatly against the plaintiffs' claims. Plaintiff R. L. Ledingham swears that David Hoggan agreed to pay for his board and lodging when he had won his case in the Privy Council, commonly known as the "Settlers' Rights Case." This is not quite as it is pleaded, but I will take his sworn statement and that of his wife and co-plaintiff in preference to the formal pleading. Judgment in the Privy Council in David Hoggan's favour was delivered on the 22nd July, 1907. On the 30th July, 1906, plaintiff R. L. Ledingham had borrowed $1,000, on a promissory note from David Hoggan, and on September 21st, 1907, that is to say, two months after David Hoggan had won his case, Ledingham re-paid $500 on account of the note, and as he swears after David Hoggan's death repaid the balance to William Hoggan, David Hoggan's executor. Ledingham's explanation of this is not at all satisfactory. His repayment of these moneys was inconsistent with his claim that at that time he was entitled to a large sum of money from David Hoggan for board and lodging.

The appeal should be dismissed.

IRVING, J.A.:—For the protection from unfounded claims it has always been a rule of the courts that claims against the estate of a deceased person should be examined with jealous suspicion. In re Garnett Gandy v. Macaulay (1885), 31 Ch. D. 1, applied in a case somewhat similar to this, Doidge v. Mimms (1900), 13 Man. 45. That rule was originally a rule of practice, but since 1900 it has been made a rule of law. That statute, R. S. B. C. ch. 78, sec. 11, has not extended the rule, but merely changed it from a rule of practice to a rule of law.

In the present case which was dismissed by the Chief Justice for reasons then given, but of which we have not been furnished copies, we were led to believe by appellants' counsel on his opening that the plaintiff's claim was hardly disputed and that it was only a question as to the sufficiency of the corroborative testimony that prevented judgment being given for the plaintiffs. On hearing the other side, a very different question or series of questions are presented for our decision. As we have not the findings of fact by the learned Chief Justice it is necessary for us to go into the evidence at some length.

The action launched in April, 1913, is brought against the executors of the late William Hoggan (who died in December, 1912), for board and lodging furnished to his brother David Hoggan for 572 weeks, viz.: from 1st April, 1897, to 23rd April, 1908, and also for board and lodging furnished to the late William Hoggan for 33 weeks, viz.: from 23rd April, 1908, to 6th December, 1909. The action was brought by the husband of a niece of the two Hoggans in respect of board and lodging in the home of the plaintiff and his wife in Victoria, on two distinct contracts made with each of the two brothers David and William by the plaintiff and the wife, no one else being present at the interviews when the alleged contracts were made.

The making of the contracts is questioned. The fact that David Hoggan did spend some time in the Ledingham home either as a guest or a lodger is not disputed, but that he was there for weeks and weeks is denied, and the rate per week is said to be excessive.

I have read the evidence and I agree with the conclusion reached by the Chief Justice. Having regard to the great lapse of time, this is a case which should be considered with jealous suspicion and I would hold that the plaintiff has not

proved either of the contracts with David or William he relies on.

I will take the alleged contract with David first which was supposed to have been made in 1897. The relationship of the parties throws considerable light on the questions at issue, and therefore it will be convenient to describe the parties and their occupations. The two Hoggans, David and William, were brothers—both bachelors—who lived at Nanaimo and there carried on business in partnership as grocers. The plaintiff Mary Ledingham was their niece who had been brought up by their mother. Another member of their family was Thomas Aitken, who also lived at Nanaimo. David Hoggan and others, one of whom was Samuel Waddington, had taken up land near Nanaimo in what is known as the Island Railway Belt, and had brought an action against the E. & N. Railway Co. to establish his right to that land as "an actual settler" for agricultural purposes within the meaning of the B. C. Settlement Act (1883), 47 Vict. 14. His case was carried to the Privy Council, where he was beaten, the decision being that he was in no sense an actual settler for agricultural purposes. The decision was given in the spring of 1894: see [1894] A. C. 429; 63 L. J. P. C. 97. At that time David Hoggan, who was about sixty years of age, had, in addition to his grocery business at Nanaimo, some 790 acres on Gabriola Island and some lots in the city of Vancouver. The plaintiff, Mary Ledingham, was married and living in Victoria with her husband the plaintiff Robert Ledingham, and there was also living (in Victoria I think) William Ledingham, a brother of Robert. This brings us down to the fall of 1896, when, according to plaintiff, David came to his house and remained there until his death which took place on the 23rd of April, 1908. He came to Victoria (as I understand Robert Ledingham to say) to carry on with greater convenience a campaign in the Legislature to secure an amendment to the Settlement Act so that his rights as a settler would be recognized. In this campaign William Ledingham was to assist him. The arrangement we are told was that the property claimed was, in the event of success, to be divided equally between David Hoggan, William Ledingham and one Hawthornthwaite.

On the 10th of February, 1904, the legislative campaign came to an end by the passage of an Act under which David Hoggan was declared entitled to his grant, and it was con-

ceded a grant was issued to him shortly after. As the claim for board runs from April, 1897, to April, 1908, it may be convenient to continue the history of the Settlers' Rights litigation. The right of the provincial Legislature to pass the Act of 10th February, 1904, was questioned, and the case ultimately carried to the Privy Council: see McGregor v. E. & N. Ry. Co., [1907] A. C. 462. In 1906 Hoggan brought an action for a declaration of title to the minerals, and obtained judgment: see E. & N. Ry. Co. v. Hoggan (1908), 14 B. C. 49.

In the spring of 1897, according to Robert Ledingham, David wanted to pay his board bill from the fall up to that date, and he offered $20, which sum apparently was accepted in full to that date. The plaintiff then gives this evidence:—

"Well he says Bob I haven't got—my wife and I—I haven't got much money and he says, you know I have been to the Privy Council and I have spent all I had there and he says he was trying to do what he could but we came to an arrangement right there that we would not look for any pay until he gained his case, that is, he was to pay us when he gained his case, and he was to pay us well if he won the case, and if he did not win the case we were to be paid anyway.

"The Court:—What amount?

"A. There was no amount made, that is it. He was to pay us well if he won the case, and if he did not win it he would pay us. Because he hadn't any money, but he had property you see. And we went through the whole conversation—and he couldn't realize very much on his property at that time. You see property was not worth but very little."

That is the contract sued on. The other plaintiff, Mary, gave the following account, the nature of which was to justify the amount of the per diem charge:—

"Q. Now do you remember a conversation with David Hoggan in the spring of 1897? A. Yes.

Q. When some arrangement was made. Now, tell us what the conversation was, if you remember it.

A. Well he had been with us then for perhaps a week or so, and he offered us some money, at least he offered my husband, and my husband would not take it, but he left it on the table, and he said, I must make some arrangement—you won't take anything, now, he said, I am going into this case, I think I will be able to fight the thing out, but I haven't

any means, any money only a small income, and if you will see me through the case, help me along, he said I will see you are paid when I win the case.

Q. Speak louder please. A. He said he would see we would be paid if he won the case, but whether he won it or not we would be paid anyway; be paid well if he won it, but paid anyway, because you know, he says, I have some property."

After Mary Ledingham had given this and further evidence in support of her husband's claim, she was, at the suggestion of the learned Chief Justice, but on the application of the plaintiff's counsel, added as a party plaintiff, and the hearing proceeded.

The first question raised before us on the appeal is as to the sufficiency of Mary Ledingham's corroboration to satisfy the statutory rule. Section 11 is as follows:—

"In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter, occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

It differs from the Nova Scotia Statute referred to in McDonald v. McDonald (1902), 33 S. C. R. 145, but is identical with the Ontario statute dealt with in Thomson v. Coulter (1903), 34 S. C. R. 261. Mrs. Ledingham being, in my opinion, an opposite, or at any rate, an interested party, I do not think her evidence can be regarded as corroborative See also Vavasseur v. Vavasseur (1909), 25 T. L. R. 250, where two persons made a joint claim, Channell, J., said it was necessary to have independent corroboration in addition to what was supplied by each telling the same story as the other.

The defence is that what board and lodging was afforded by the plaintiffs was to be expected having regard to the relationship between David Hoggan and Mary Ledingham and the promises (if made) were made in a general way and Mary Ledingham and her husband looked for their reward not to any contract but to her uncle's generosity. Cf. Farina v. Fickus, [1900] 1 Ch. 331, 69 L. K. Ch. 161; Montreal Gas Co. v. Vasey, [1900] A. C. 595, 69 L. J. P. C. 134. I do not

think she can be regarded as an independent witness: Rawlinson v. Scholer, 79 L. T. 350. Nor can I consider her evidence corroborative as to his rewarding her, as what she says is consistent with compensation being allowed by his will or otherwise: per Lindley, L.J., In re Finch (1882), 23 Ch. D. 261, cited by Killam, J., in Thomson v. Coulter (1903), 34 S. C. R. 264. Nor do I find satisfactory corroborative evidence of a contract in any of the other evidence adduced. If, therefore, the Chief Justice dismissed the action on that ground, or because there were rebutting circumstances, I agree with him.

That disposes of the first alleged contract.

The plaintiff's second string to that bow was that William, after David's death, agreed to pay the claim. As to this the plaintiff's evidence is not corroborated by any one but his wife's and her testimony tells a somewhat different tale.

Then as to the claim against William for board and lodging supplied to him. The case rests on the evidence of two discredited witnesses, and I think the judge was justified in dismissing this claim also.

It was argued that as Mary Ledingham had been made a party at the suggestion of the Chief Justice, that the rule laid down in Vavasseur v. Vavasseur does not apply. I do not think the plaintiffs can now put forward such an argument in view of the application being made by and in her presence, nor can the court look at what led up to the amendment.

But, assuming there was a promise such as the plaintiff relies on, I am not satisfied that David Hoggan did occupy the room reserved for him for the long period claimed, for the following reasons:—

1. The time charged for far exceeds the time occupied by the campaign carried on in Victoria.

2. The evidence of Waddington and Kirkham (who have no interest in this action) satisfies me that David Hoggan was not a continuous visitor at Victoria, but spent nearly all his time in Nanaimo.

3. The letter produced (exhibit 1, p. 197) speaks of "being in Victoria for the last week. I came down to meet a niece and nephew, etc." "I am speeling in Bob's house. They are camping out."

4. Exhibit J., 24th September, 1905, shews that he was living at Nanaimo and his death occurred at Nanaimo. On the whole I would say that the statement with which Robert Ledingham opened his evidence, viz.: that he remained at his house from 1897 till his death in 1908 was untrue, and I am also satisfied by the evidence that the charge of $15 per week was excessive for the accomodation afforded, particularly when it is contrasted with the $20 given by David Hoggan in the spring of 1897 for what he had received in the winter of 1896-1897.

I would regard the sum of $700, a very fair remuneration for what they gave David and William, and as William paid Mary Ledingham that sum in November, 1910, I would dismiss the action on that ground. Her explanation as to why he paid her that sum seems to me unsatisfactory. For one reason the sum of $700 is altogether out of proportion to the expense of two women going to California to stay with their uncle.

MARTIN, J.A.:—I find myself unable to take the view that the learned trial judge reached a wrong conclusion, and therefore the appeal should be dismissed.

GALLIHER, J.A.:—At the close of this case I was prepared to give judgment dismissing the appeal.

Further consideration confirms me in that view.

MCPHILLIPS, J.A.:—This appeal is from the judgment of the Chief Justice of British Columbia (Hunter, C.J.), and raises a question which it seems to me is concluded by authority and statute law, that is that the action is one requiring corroboration.

The learned Chief Justice did not give a written judgment, but counsel state that he proceeded upon the ground of lack of corroboration.

The evidence in the case is at some considerable length and the trial would appear to have extended over a period of three days. In a review of the evidence which was very exhaustively gone over upon the appeal by counsel for both sides, I cannot bring myself to any other conclusion than that arrived at by the learned Chief Justice, and it is a case which is peculiarly one for the trial judge, in that the evidence is relative to a claimed cause of action against the estate of a deceased person.

The statute law which calls for consideration is to be found in the Evidence Act (R. S. B. C. 1911, ch. 78) being sec. 11 thereof.

The statute law of British Columbia is in the identical words of the Ontario Act (R. S. O. (1897) ch. 73, sec. 10) which received the consideration of the Supreme Court of Canada in Thompson v. Coulter (1903), 34 S. C. R. 261. Mr. Justice Killam at p. 263 made use of the following language:—

"In my opinion this enactment demands corroborative evidence of a material character supporting the case to be proved by such 'opposite or interested party' in order to entitle him to a 'verdict, judgment or decision.' Unless it supports that case it cannot properly be said to 'corroborate.'

A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case."

I am of the opinion that there is a lack of corroboration even were the action to be looked at as one by Robert L. Ledingham alone, but if the action is to be looked at as being one by both the husband and wife, Robert L. Ledingham and May Ledingham (May Ledingham being added as a party plaintiff at the trial), then there is the additional difficulty of establishing corroboration. Mr. Justice Channell in Vavasseur v. Vavasseur (1909), 25 T. L. R. 250, at p. 252, said:—

"That was a very serious difficulty because the rule with regard to corroboration was very clear and when two people made a joint claim it was necessary to have independent corroboration in addition to what was supplied by each telling the same story as the other. The meaning of the rule was that the court could not place reliance on the recollection of people in such circumstances without corroboration, not that the court thought that the witnesses were saying anything untrue."

In my opinion this appeal can be decided solely upon the ground that the action fails by reason of there being the absence of that corroboration which is the prerequisite to the right to judgment being in favour of the plaintiffs.

In arriving at the conclusion which I have upon this appeal it is with some very considerable regret as it is abundantly clear from the evidence that the plaintiffs did give most kindly care to the late William Hoggan, who was for

such a long time in delicate health, and were most solicitous for his welfare and their acts and deeds are to be commended but unfortunately fail to establish a cause of action sufficient in law.

In my opinion the appeal should be dismissed.

Appeal dismissed.

BRITISH COLUMBIA.

FEBRUARY 26TH, 1915.

COURT OF APPEAL.

COOK v. CANADIAN COLLIERIES LTD.

Railway — Negligence — Antiquated System of Coupling — Unincorporated Railway Operated by a Company on its Own Lands—Liability Apart from sec. 264, sub-sec. c. of the Railway Acts (R. S. C. 1906, ch. 37.)

A coal company operated a train over its own lands for the purpose of carrying coal from its mines to its wharf. A passenger-car was attached to the train. The railway was unincorporated:—

Held, that although sec. 264, sub-sec. c. of the Railway Act (R. S. C. 1906, ch. 37), requiring incorporated railways to use couplers which couple automatically by impact, did not apply to the railway in question, the use of the antiquated system of a link and pin coupling by the said company constituted negligence *per se*. (IRVING, J. A., dissenting).

An appeal from the judgment of CLEMENT, J., without a jury, of May 19th, 1914, in favour of the plaintiff in an action for damages for injuries caused by the alleged negligence of defendant company.

The appeal was heard by MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Maclean, K.C., for defendant company, appellant.

Leighton, for plaintiff, respondent.

IRVING, J.A. (dissenting):—I would allow the appeal and dismiss the action. This is not a railway within the Dominion or Provincial statute. It was built by the Wellington Collieries Co.—a coal company—and was operated by

them over their own lands for the purpose of carrying coal from their mines to their wharf, a distance of some 12 miles. A passenger car is attached to the train.

The defendants operate it in the same way and make reports to the Department of Railways annually, and in those reports state that it is being operated without any charter.

I do not think it can be laid down that every mining company omitting to use automatic couplers is guilty of negligence, and in the absence of such legislation I am unable to say that the defendants were guilty of any negligence.

MARTIN, J.A.:—After a careful perusal of all the evidence I am satisfied that the learned trial judge was justified in the view he took of the facts and in such case no legal difficulty exists to prevent the plaintiff from holding the judgment entered in his favour.

The appeal, therefore, should be dismissed.

GALLIHER, J.A.:—I would maintain the judgment of the learned trial judge.

While this is not an incorporated railway company, and the provisions of the Railway Act, R. S. C. 1906, ch. 37, sec. 264, sub-sec. c. cannot be invoked, yet the defendants are operating a railway carrying passengers and freight and exposing their workmen to the same dangers as any duly incorporated railway company.

The link and pin coupling is now a thing of the past in Canada on all operating railways, Parliament in its wisdom, owing to the attendant danger to employees, having seen fit to legislate abolishing it.

It has been so long recognised as dangerous, and as for a considerable number of years safer and better appliances have been in vogue, I hold that the failure to adopt these appliances and to continue the antiquated system to the greater danger of its employees is a negligent act on the part of the defendants.

It may be said that it is hard to draw the line in such a case, and while on ordinary logging roads as we understand them in this Province, or in underground workings in mines it might not be reasonable to exact the same degree of modern equipment, yet parties operating as the defendants here are should I think be held to be negligent.

McPHILLIPS, J.A.:—This is an appeal from the judgment of Mr. Justice Clement in a negligence action. The learned trial judge was sitting without a jury, and in giving a considered judgment has by his findings of fact held that the defendants were guilty of negligence and absolves the plaintiff from any contributory negligence. The evidence admits of these findings of fact and in my opinion no such case has been made out upon this appeal which would warrant their disturbance.

The couplings in use were certainly not of the most modern kind, but it could not be said that this alone would constitute liability, yet there must be a time when the more modern appliances should be adopted. When we have the almost obsolete couplings and a defective system as well and the non-enforcement of rules of safety—if any such really existed—a complete case is made out of negligence for which the appellants must be held to be answerable. The cases which in my opinion support the conclusion to which I have come upon this appeal are—Fralick v. G. T. Ry. Co. (1910), 43 S. C. R. 494, Mr. Justice Duff at pp. 519-520: Stone v. C. P. R. Co. (1913), 47 S. C. R. 634. It is true the latter case to a large extent goes upon statutory duty, but Mr. Justice Anglin, at p. 656 said:—

"A finding of negligence on the part of the defendants is probably involved in the finding of such a defect, but a finding of negligence is not requisite where a breach of statutory duty causing the injury complained of has been established."

It is a case, however, that is most instructive upon the question so strenuously advanced in the present case that the plaintiff was guilty of contributory negligence, and I would in particular refer upon this point to the judgment of Mr. Justice Anglin at pp. 660, 661, 662, and to Carrigan v. Granby (1909), 16 B. C. R. 157.

I do not find it necessary to express an opinion upon the question as to whether the appellants are subject to the Railway Act (R. S. B. C. 194).

The appeal therefore should in my opinion be dismissed.

MACDONALD, C.J.A., agreed with the trial judge.

Appeal dismissed; IRVING, J.A., *dissenting.*

BRITISH COLUMBIA.

FEBRUARY 26TH, 1915.

COURT OF APPEAL.

COLUMBIA BITULITHIC LTD. v. VANCOUVER LUMBER CO. ET AL.

Company—Trading Company—Powers Given by Charter—Incidental Powers—Power to Loan—Chattel Mortgage Given as Security for Future Advances—Ultra Vires—Interpleader—Seizure by Judgment Creditor—Invalidity of Mortgage—Affidavit of Due Execution Sworn Before Solicitor of Both Mortgagor and Mortgagee — County Court Rules, 1905, r. 309 and sec. 8 of Bills of Sale Act, (R. S. B. C. 1911, ch. 20)—Effect.

A chattel mortgage given to a trading company as security for a loan and future advances is void unless the company has express or incidental power to loan, the omission from the memorandum of a trading company of express power to loan being of the utmost significance in determining the question of incidental power.

The question of what incidental powers a company has is to be determined by fair implication from the expressly conferred powers.

Semble, that although a chattel mortgage given to a company to secure an *ultra vires* loan is void, the company may nevertheless recover its own money from the mortgagor.

Per MARTIN, J.A.:—The rules of the court in which a chattel mortgage or a bill of sale is deposited apply thereto and therefore a chattel mortgage filed in the County Court is void (under County Court Rule 309) where the affidavit of due execution is sworn before the common solicitor of both mortgagee and mortgagor.

Re Bagley (1911), 80 L. J. K. B. 168, followed.

The case came on for trial on September 23rd, 1914.

The Vancouver Lumber Co. recovered judgment in an undefended action against the Scott-Goldie Co. as the acceptors of certain bills of exchange. The sheriff on January 8th, 1914, seized, under a writ of fi. fa., goods to which the Columbia Bitulithic Co. claimed a title under a chattel mortgage given to it on August 16th, 1913, to secure advances up to the sum of $50,000, and the Burrard Co. claimed as a judgment creditor. The sheriff thereupon interpleaded, and the parties were ordered to proceed to the trial of an issue in the Supreme Court, the Columbia Co. to be plaintiff and the Vancouver Co. defendant.

The issue directed to be tried was whether at the time of the seizure by the sheriff the goods seized were the property

of the Columbia Co. as against the Vancouver Co. The Columbia Co. was a shareholder in the Scott-Goldie Co. which, at the request of the directors, of the Scott-Goldie Co., advanced money to that company, and as security therefor took the said mortgage.

An appeal by plaintiff from the following judgment:—

MURPHY, J.:—I feel bound by the decision in Carter v. Columbia Bitulithic Co., 28 W. L. R. 758, to hold the transaction out of which the chattel mortgage arose to have been ultra vires of the plaintiff company. They had no more authority under their corporate powers to make enormous loans than they had to guarantee debts and I cannot see how the one act can be held any more incidental to their business than the other. The reason for the reluctance frequently expressed to imply a power in a company to become a surety is given in Union Bank v. McKillop, 30 O. L. R. p. 87, at p. 99, by Hodgins, J.A., delivering the unanimous judgment of the Court of Appeal as being "because the result of a guarantee against the debts of another company is to put the assets of the guaranteeing company in peril for liabilities incurred in the carrying on of a business in which the guarantor is not directly interested and whose engagements it has no means of controlling." By the mortgage in question here an amount of cash assets equal to the total authorised capital of the plaintiff company was placed in the hands of a company in which it was no more directly interested than was the McKillop company in the case cited, in the West Lorne Wagon Co., that company holding some shares in the wagon company just as plaintiff company here does in the Scott-Goldie Co., and just as clearly the plaintiff company had no means of controlling the engagements of the Scott-Goldie Co. If ultra vires the transaction can give rise to no debt—legal or equitable. Birkbeck Permanent Benefit Society, In re, 81 L. J. Ch. 786, affirmed as to this in Sinclair v. Brougham, [1914] A. C. 398. These cases shew that equitable rights arise from ultra vires contracts, but evidence on these was not led and, as I understand, the action could not be. The whole basis of these proceedings is contract and according to the authorities cited no contract can exist. Securities given to cover an ultra vires contract cannot be retained as a matter of contract, although they may be effective when equities are

shewn to the extent of such equities. Cunliffe Brooks & Co. v. Blackburn and District Benefit Building Society, 9 A. C. 857, affirming the decision of the Court of Appeal, 22 Ch. D. 61.

No such equities were proven before me. Further, if there is no legal or equitable debt how can this chattel mortgage be held good as against creditors, since putting it on its highest ground it is intended as a security for a debt, which must be verified by an affidavit of bona fides. When the Bills of Sale Act requires that with respect to such chattel mortgages the affiant must state "that the grantor is justly and truly indebted to the grantee" this statement I think must mean a debt which is either legal or equitable. If so, the requirements of the Bills of Sale Act have not in reality been complied with and could not be, and the chattel mortgage is void against the defendants.

The issue is decided in favour of defendants.

The appeal was heard by IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Bodwell, K.C., for plaintiff, appellant.

Davis, K.C., for defendant, respondent.

IRVING, J.A.:—In Carter v. Columbia Bitulithic Co., 28 W. L. R. 758, this court held a guarantee given by the Columbia Bitulithic Co. for the convenience of the Scott-Goldie Co. was ultra vires.

The defendants in this action having recovered a judgment against the Scott-Goldie Quarry, Ltd., the grantors of a chattel mortgage, dated 16th August, 1913, seized the goods and chattels mentioned in the mortgage; the plaintiffs thereupon claimed the goods as theirs under the said mortgage, and an issue, which came on to be heard before Mr. Justice Murphy, was directed.

That learned judge, who felt that he was bound by our decision in Carter v. Bitulithic, was of the opinion that the transaction of loan was ultra vires of the company, and that as it was a proceeding which neither the directors nor the company had authority to make, the issue must be decided in defendants' favour.

Mr. Bodwell draws a distinction between a lending on the security of a mortgage (that is this case) and the giving of a guarantee (as in the Carter Case), and contends that

what was done in this case was "incidental" to the powers of the company: Ashbury Carriage Co. v. Riche (1875), L. R. 7 H. L. 653, 44 L. J. Ex. 185, construing incidental as "reasonably" incidental in accordance with the opinion of Selwyn, L.C. in A.-G. v. Great Eeastern (1880), 5 App. Cas. 473, the word "incidental" was discussed in the Osborne Case, [1910] A. C. 87; 79 L. J. Ch. 93, and means nothing more than "by fair implication."

In Union Bank v. McKillop (1913), 30 O. L. R., p. 87, a number of cases relating to guarantees by a trading company are collected. It is not necessary that further reference should be made to them.

In my opinion the lending of money and undertaking to make future advances on mortgage is not incidental to any of the purposes mentioned in the plaintiffs' memorandum. The power to loan is quite a common power to insert and its omission from the memorandum is of the utmost significance in the case of a trading company.

There seems to be no golden rule by which you can determine all cases as to what is incidental except this—Is what has been done and is now objected to, reasonably incidental to the business authorized by the memorandum? This rule—almost no rule, it is so simple—is perfectly plain, the difficulty lying in its application. We are warned not to give way to the argument that because what had been done assists or would be convenient to the company. See A.-G. v. Mersey, [1907] A. C. 415. It does not think anybody reading the memorandum would say that lending the money of the company was incidental to any of the matters mentioned in the memorandum of the company. Since that pungent judgment was delivered the words "incidental powers" or whatever equivalent language is used must be read strictly. See A.-G. v. West Gloucestershire Water Co., [1907] 2 Ch., at 343.

Mr. Bodwell, on the assumption that his first point is bad, then argued that the chattel mortgage given to secure the loan was not necessarily bad, and that it would support the plaintiff's claim against the seizure. His main authority was In re Coltman, Coltman v. Coltman (1881), 19 Ch. D. 64, 51 L. J. Ch. 3. That was a case on a promissory note given to the trustees of a friendly society to secure £300. The defendant's contention was that as the trustees were not authorized to make a loan to anybody other than a member

of the society, the loan was an illegal act and therefore the the society could not recover.

The Court of Appeal, however, thought that although the trustees had no authority to make the loan, the majority of the members could have done so, and therefore the loan was not illegal, and the plaintiffs could recover. So far as I can find that case has not been over-ruled. The right of the lender to recover notwithstanding there has been a breach of trust on his part seems well established. Cf. the case of Ernest v. Crosdyl (1869), L. R. 29 Ch. 580.

In the present case the plaintiff company may have the right to recover their own money from the Scott-Goldie Co. by a tracing order or a decree for rescission or both, but that is quite a different thing to being able to hold as their own property something which was mortgaged to them when they parted with their money. That something could only become theirs by virtue of a contract and it is that particular contract that they were not authorised to enter into.

The consideration for it was wanting and therefore I reach the conclusion that the security is void.

I would dismiss the appeal.

MARTIN, J.A:—Apart from other questions, an objection is raised to the validity of the chattel mortgage on which the plaintiff relies, and it should, I think, be determined at the outset, because if the objection is sustained that is an end of the matter.

Sec. 8 of the Bills of Sale Act provides that the bill of sale "be registered by the filing of such bill of sale or copy thereof, as the case may be, together with such affidavits as are herein required, in the County Court registry of such county or place (as specified) . . . in the office of the Registrar of the County Court at Victoria," or as the case may be. And the following proviso is at the end of the section:—

"Provided, however, that the Lieutenant-Governor in Council may from time to time subdivide or alter the said districts, and provide for the registration of bills of sale in the office of any Registrar of a County Court for a district or at a place different from those above mentioned."

Rule 309 of the County Court Rules (1905) is as follows:—

"An affidavit shall not be filed or used which has been sworn before any person who was at the time of the swearing

of the same the solicitor acting for the party on whose behalf such affidavit is to be used, or the agent, partner or clerk of such solicitor, or who is the party himself."

Order 38, r. 16 of the English Supreme Court Rules is the same as our Supreme Court Rule 536, and is thus:—

"No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself."

Upon that rule and the English Bills of Sale Act, 1878, it was decided by Wright, J., in Baker v. Ambrose, [1896] 2 Q. B. 372, that "I must hold that the Rules of the Supreme Court generally apply to bills of sale," and therefore a bill of sale was void because the affidavit of due execution was sworn before the solicitor for the defendant in that action who was the grantee under the bill of sale, as the plaintiff company is in this action. That decision has been affirmed by the unanimous decision of the Court of Appeal in Re Bagley (1911), 8. L. J. K. B. 168, quite apart from the proviso in the English Commissioners for Oaths Act, 1889, ch. 10, sec. 1, (which is not to be found in our Evidence Act, ch. 78 wherein the powers of commissioners for taking affidavits are dealt with by sec. 61 et seq), the Master of the Rolls saying, p. 171:—

". . . . I feel no doubt that under Rule 16 of Order XXXVIII, the same objection applies as under the general language of the Act to this so-called affidavit, that it was sworn before a person who had no authority—that in fact it was a proceeding coram non judice."

The prohibition in our County Court rule is stronger than in the English Rule as it says that the affidavit shall not even "be filed" if sworn contrary to it, so to escape from these decisions it was argued that the affidavit was not filed or used in the Court at all in the true sense, and a distinction in principle is sought to be drawn between the masters of the Supreme Court of Judicature, who under sec. 13 of the English Act are the appointed officers with whom bills of sale are to be filed, and the Registrars of the various County Courts who are the appointed officers for that purpose under sec. 8 of our Act. The affidavit in England may be sworn before a master or commissioner only, (sec. 17); here before a registrar, or commissioner, and several other persons (sec. 24). After a careful perusal of both acts and

the cases decided thereon, I am unable to perceive any such distinction, and it is clear to me that the governing factor in the decisions is that once the document is filed in a court then the rules of that court apply to it, and nothing turns on the particular officer who is required to perform the duties in connection with the registration. In each case there is a registrar who is required to keep a principal book called a register (and an index book) giving the information of a similar character as set out in sec. 13 and Schedule B. in the English Act, and secs. 21 and 25 and Schedule C. in our Act, the only difference being that our register gives further information in two respects. Power is given to a judge of the Supreme Court in each case to rectify the register (cf. Eng., sec. 14 and our sec. 21), but our section also provides that in addition to the rectification of the register itself an office copy of the order "shall be annexed to the bill of sale or any copy thereof, as the case may be and registered therewith." Furthermore, by sec. 12 of our Act, either a judge of the Supreme or County Court may make an order permitting the filing of the bill of sale in the case of the attesting witness dying or leaving the province, etc., and a copy of this order must also be annexed and filed. There is no section in the English Act which corresponds to this one giving the judges of both Supreme and County Courts jurisdiction; sec. 2 gives jurisdiction to the former judges only. So here we have proceedings authorized by this act to be taken in both courts and, therefore, it might be plausibly contended that the rules of both should apply, according to the decisions, and this case may not depend upon the rules of the County Court alone as was assumed at the argument. But it is sufficient in this case to hold that the rules of the court which is the depository of the instrument should at least apply.

Then a further distinction was suggested that in England the judges have power to make rules of court, whereas in this province they are made by the Lieutenant-Governor in Council, both in the Supreme and County Courts and under this Bills of Sale Act, sec. 25, and it was suggested that this shewed an intention to regard the English Bills of Sale proceedings as being more under the control of the court than ours. But that suggestion is not sound because the English Act, sec. 21, provides that rules for the purposes of that Act "may be made and altered by the like persons and

in the like manner in which rules and regulations may be made under and for the purposes of the Supreme Court of Judicature Acts, 1873 and 1875." Now in both those acts power was given to Her Majesty to make rules by order-in-council during the times and for the purposes therein specified: cf. secs. 68-9 of 1873, and sec. 17 of 1875. But more than that, the Rules of Court under the latter act were made by Parliament itself by sec. 16 and set out in the first schedule thereto and declared to "come into operation at the commencement of this act." So there is no magic in the fact that the judges had authority given them to "alter and annul" those rules which were enacted and promulgated by Parliament and order-in-council which were to and did remain in force till altered by the judges: cf. 16 and 17 of 1875, and Wilson's Judicature Act (7th ed., 1888), pp. 75, 128, 795. Therefore the analogy between the two enactments is complete in all respects, and I can discover no real ground for distinguishing the authorities.

Some importance was sought to be attached to the fact that it appears to be the practice in England to head the affidavit "In the King's Bench Division," which was said in Bagley's Case, 171, to be "proper" to do, because the office of registrar is performed "by the Master attached to the King's Bench Division," and I have no doubt that it would also be "proper" to follow that practice here as the registrar is "attached to the" County Court, though it has not been done so far and is not necessary. But no doubt proceedings under secs. 12 and 21 would be properly and should be headed in the name of the court, Supreme and County, which is resorted to for an order, as the case may be.

It only remains to notice the contention of the appellant that as the solicitor here acted for both grantor and grantee the rule does not apply as both interests are safeguarded. I note that the converse of that was argued for the appellant in Baker v. Ambrose (where Vernon v. Cooke (1880), 49 L. J. Q. B. 767, now relied upon was distinguished), and I think rightly so, because if the affidavit were taken by a person who was prohibited from taking it because he was acting for one party he cannot avoid that prohibition by acting for that party plus another. The prohibition in the rule is absolute and expresses this policy unmistakably—such an "affidavit shall not be filed or used . . ."

It follows that the appeal should be dismissed.

McPHILLIPS, J.A. (dissenting):—This is an appeal from the judgment of Mr. Justice Murphy upon the trial of an interpleader issue in which it was held by the learned judge that the goods seized by the sheriff were not the property of the plaintiffs as against the defendants the execution creditors.

The learned trial judge was of the opinion that the decision of this court in Carter v. Columbia Bitulithic (1914), 28 W. L. R. 758, was a controlling decision and that the chattel mortgage upon which the plaintiffs relied could not be held to be a legal or subsisting security, the whole transaction being ultra vires, that is, the loan made to the Scott-Goldie Quarry Limited—the execution debtors—of $50,000, and the security taken therefor upon the goods and chattels and other assets of the Scott-Goldie Quarry Limited by the plaintiffs.

With all respect to the learned trial judge, in my opinion, the present case is not to be determined by the decision in Carter v. Columbia Bitulithic, supra. In that case there was admittedly no power to guarantee the obligations of others, and further the promissory note and renewal thereof were without consideration. In the present case in my opinion upon the facts there was authority in the plaintiffs to make the loan and take security by way of chattel mortgage and further were it illegal to lend the money the defendants (the execution creditors) are not in any better position than the mortgagors (the execution debtors)—the chattel mortgage being duly filed. The goods and chattels and other assets mortgaged are entitled to be held by the plaintiffs as security for the loan. The mortgagors could not set up the illegality of the transaction, and thereby successfully resist payment of the loan.

That there was authority in the plaintiffs to make the loan is clear to me when the general nature of the business of the plaintiffs is looked at and as set forth in the memorandum of association and articles of association. Particular reference may be made to the latter words in clause 3 of the memorandum of association and clause 28 of the articles of association, reading as follows:—

"3. . . . and generally to do all acts and things necessary or convenient to carry out and perform all the acts above enumerated and all acts incidental thereto.

"28. No officer or agent of the company shall borrow money or make loans without authority from the Board of Directors but the Board may authorize in general terms the total sum of money which may be borrowed by any specified officer or officers of the company. No loan of money shall even be made to any shareholder."

It cannot be said that it was not in contemplation that loans might be made and this loan it is evident if not necessary was at least convenient in the carrying on of the business of the company and may also be said to have been an act reasonably incident to the carrying on of the business of the plaintiffs.

The principle as defined in Ashbury Railway Carriage and Iron Co. v. Riche (1875), L. R. 7 H. L. 653 must not be driven too far. In Attorney-General v. Great Eastern Ry. Co. (1880), 49 L. J. Ch. (H.L.) 545, the Lord Chancellor (Lord Selborne) at p. 547, said:—

"I assume that your Lordships will not now recede from anything that was determined in Ashbury Railway Carriage & Iron Co. v. Riche, (44 Law J. Rep. Exch. 185), and it appears to me to be important that the doctrine of ultra vires as it was explained in that case should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably and not unreasonably understood and applied; and that whatever may be fairly and reasonably regarded as incidental to or consequential upon those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires."

Then we have the case of Lock v. Queensland Investment & Land Mortgage Co. (1896), 65 L. J. C. (H.L.) 798. That was a case in which it was held that,—

"A company limited by shares may if so authorised by its articles of association pay interest out of capital to shareholders who have paid up their shares in advance of calls."

The Lord Chancellor (Lord Halsbury), at p. 799, said:—

"Then it remains that this is an arrangement which the legislature has sanctioned in the case of Table A. and the statute expressly gives that as an example of what may be done unless the company think proper to adopt articles of their own. In this case they have adopted articles of their own which have precisely the same effect. Under these circumstances it appears to me it is an undue compliment to

the doubts which have suggested to do more than say that I entirely concur in every word of the judgment of Lord Justice Fitzgibbon in Dale v. Martin ((1882), 9 L. R. Ir. 498), and in every word of the judgment of Lord Justice Lindley in this case. The only commentary I am disposed to make is that Lord Justice Lindley does seem to suggest that the words are not absolutely apt for the purpose. With the greatest deference to his Lordship, I do not concur in that opinion. It seems to me that the words are very plain and apt for the purpose for which they are designed by the legislature and it would be to my mind a most perverse proceeding to construe these words in any different sense because by some improper use of the power thus given it might be made mischievous in its operation. If it were mischievous in its operation and necessarily mischievous in its operation it would to my mind be no argument if the statute has expressly authorised the thing to be done. But as a matter of fact what has been done in this particular case is admitted to have been done perfectly bona fide and with no such abuse as it has been pointed out might result."

In the present case there is no suggestion that the loan was not perfectly bona fide—as when the powers of the plaintiffs are considered as set forth in the memorandum and articles of association—it cannot, in my opinion, be said effectively that there was not the power to make the loan and it follows that if the loan was a proper exercise of powers committed to the directors the taking of the chattel mortgage was proper and an intra vires not an ultra vires transaction.

In Rainford v. James Keith & Blackman Co. Ltd. (1905), 74 L. J. Ch. (C.A.) 531:—

"The articles of the company empowered the directors to lend money and generally undertake such other financial operations as might in their opinion be incidental or useful to the general business of the company:"

And it was "Held, that this authorised the making of a loan to a servant trusted by the company."

Stirling, L.J., at p. 539, said:—

"It seems to me that in these circumstances the plaintiff makes out a prima facie case entitling him to recover from the defendant company the proceeds of a sale carried into effect in disregard of the rights of the plaintiff of which the defendant company had notice. Now how is the case

met? It is said in the first place that the transaction was ultra vires of the company. It was pointed out that the memorandum of association of the company does not expressly authorise the lending of money and this is quite true. But the memorandum does, however, among the objects of the company include the doing of all such things as are incidental or conducive to the attainment of the other objects. And by the contemporaneous articles of association the directors are empowered amongst other things—Article 116 (e) on behalf of the company to lend money and generally undertake such other financial operations as might in their opinion be incidental or useful to the general business of the company. Regard being had to the decisions in Harrison v. Mexican Railway (1875), 44 L. J. Ch. 403; and South Durban Brewery Co., In re (1885), 55 L. J. Ch. 179; I think that the lending of £180 to a faithful and confidential servant of the company cannot be held to be beyond the powers of the company."

It will be seen now that the articles of association may be turned to upon the question of the authorised powers and in the present case, can it be at all successfully contended—in my opinion it cannot—that a loan made is without authority when clause 28 of the contemporaneous articles of association is scanned and considered in conjunction with clause 3 of the memorandum of association?

Even were the present case to be looked at from the point of view that something was done which was not authorised—that is in the making of the loan—there is no evidence that the money was borrowed for an illegal purpose and the contract cannot be said to be illegal and as I have previously stated it would not be competent for the mortgagors to set up that the mortgagees, the plaintiffs, had no authority to lend the company, and that equally it is incompetent in the defendants, the execution creditors, to so contend. In re Coltman, Coltman v. Coltman (1881), 19 Ch. D. (C.A.) 64—a case where a loan was made on a promissory note to one other than a member of a friendly society which was forbidden by the Friendly Societies Act—It was urged that the transaction was illegal. It was, however, held on appeal that as it was not alleged that the money was borrowed for an illegal purpose the contract was not illegal, but merely unauthorised, that it was not competent to the makers of the

note to allege by way of defence that the payees had no authority to lend the money and that the proof thereof must be admitted. Brett, L.J., at pp. 70, 71, said:—

"The only objection to this loan is that it was made without authority. But it does not seem to me that the borrower can set up as a defence to an action that the person who lent him the money and to whom he has made a promise to repay that money had no authority to lend it to him. That is an objection which it is not for him to take. The contract is, If you will lend me so much money I will repay you that money back on demand. The consideration is the handing over the money. That is not illegal. The promise to pay back money which you have borrowed is not illegal. The money was not borrowed for any illegal purpose in order to do an illegal or immoral thing, and I cannot see that there is anything illegal in the contract. The only objection is that those who made the contract with the debtors had no authority to make it, that is an objection which he cannot take. The cases referred to by the respondent do not in my opinion support his contention. The case of Ashbury Railway Carriage & Iron Co. v. Riche (L. R. 7 H. L. 653), only decides that if the directors of a company assume to make a contract on the part of a company which neither the directors nor the company have authority to make, that contract cannot be enforced against the company, and moreover that it is so void from the beginning that it cannot be ratified by the company so as to make them liable. But the House of Lords did not hold that if money had been lent by directors without authority, the money could not have been recovered or that the borrower could set up the defence that those who lent them the money had no authority to do so."

It was held in Great Eastern Ry. Co. v. Turner (1873), 42 L. J. Ch. 83 by the Lord Chancellor (Lord Selborne) that certain shares did not pass, owing to bankruptcy, to the assignee, in that the bankrupt held the same as trustee for the railway company, although the railway company was not authorised by its statutes to invest in stock or shares of other companies—the stock being transferred to a trustee for them —the trustee being registered as the owner of the stock and notice of the trust being given to the company. The Lord Chancellor at p. 85, said:—

"In this case without legal authority, and therefore without the consent of the corporation, whose trustees and

agents they were, the directors took £700 of the company's money, and therewith purchased a property which this contest proves to be of some value—shares in the Lynn and Hunstanton Railway Co. Those shares so bought, not a farthing of any other person's money being contributed to the purchase, were placed in the names of three successive chairmen of the company and uniformly dealt with as that which they were, the property of the company. True it is that the investment was an unauthorised investment, but I entirely assent to what was said by Sir Richard Baggallay, that there is no difference whatever between an unauthorised investment of the moneys of a public company by its trustee, and an unauthorised investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous, it would be extravagant to the very last degree to say that because the money of cestui que trusts has been laid out in a way unauthorised, therefore they are not to have the benefit of whatever value there is in the property bought with their money. It is clear that the chairman, although this was an unauthorised investment, was a trustee of the shares bought with the money of the company. If they had become burdensome the burden could not have been thrown upon the company, but that is a proposition quite consistent with the other. . . .

"The case, therefore, seems to me to resolve itself into the ordinary one of trust money in the hands of the trustees which the court follows and traces into every investment which they have made, and which in the case of a trustee becoming bankrupt will not pass to the assignee. So that, whatever be the nature of the investment into which you trace the trust money invested by the act of the trustee not so as to affect the cestui que trusts with the consent which the statute contemplates and the creation of reputed ownership, I apprehend it to be clear law that the property does not pass on that bankruptcy to the assignees, but remains with the person to whom it originally belonged."

The present case is not one in which the directors have made a contract on the part of the company which neither the directors nor the company had authority to make—and there is question as to its enforcement against the company—it is the insistence upon the right to have preserved to the company certain property upon the security of which moneys of the company have been loaned—therefore in my opinion—

Birkbeck Permanent Benefit Building Society, In re (1912), 81 L. J. (C.A.) 769; and Sinclair v. Brougham, [1914] A. C. 398 have no application.

It now becomes necessary to consider the question as to whether the affidavits called for under the Bills of Sale Act (R. S. B. C. 1911, ch. 20), are good and sufficient although sworn before a commissioner who evidently was the solicitor for both the mortgagors and mortgagees. Sec. 21 of the Act defines before whom the affidavits are to be made, i.e., commissioner empowered to take affidavits. Sec. 54 of the Evidence Act (R. S. B. C. 1911, ch. 78), sets forth the method of appointment of commissioners to take affidavits in the courts, and sec. 61 provides for all commissioners previously or thereafter being enabled to take affidavits in the courts and matters before a judge not being or pending in any court, and it is further provided at the end of the section as follows: "and may also take any affidavit, affirmation, declaration or acknowledgment authorised to be sworn, affirmed or made by any statute."

Now the Bills of Sale Act requires certain affidavits to be made and sworn before a commissioner empowered to take affidavits—and they appear to be so sworn upon examination of the chattel mortgage called in question in the present case and the affidavits have been well and sufficiently sworn—unless it be that the solicitor before whom the same were sworn was disentitled to act as commissioner. In my opinion he was not. The statutory authority is clear and the Rules of the Supreme and County Courts have no application. As a matter of fact sec. 25 of the Bills of Sale Act sets forth certain rules as it is and these may be repealed, altered and varied, and no rules exist in the way of prohibition of the solicitor for the mortgagor or mortgagees or the solicitor for both parties acting as the commissioner in the taking of the affidavits called for under the Act. It could not be intended that there should be more than one set of rules.

The rules relied upon are Supreme Court Rule Marginal No. 536; County Court Rule Order XV. r. 16—and the cases cited are Baker v. Ambrose (1896), 65 L. J. Q. B. 589, 2 Q. B. 373; and In re Bayley (1911), 80 L. J. K. B. (C.A.) 168.

It will be observed, however, that sec. 17 of the Bills of Sale Act 1878 (41 & 42 Vict. ch. 31 Imp.), provides expressly that the affidavits are to be sworn "before any commissioner empowered to take affidavits in the Supreme Court

of Judicature," whilst sec. 24 of the Bills of Sale Act of British Columbia reads "Commissioner empowered to take affidavits."

In my opinion the cases cited viz.: Baker v. Ambrose, supra, and In re Bayley, supra, have no application to the statute law as we have it and therefore in my opinion the affidavits were properly sworn by a commissioner who was qualified to take affidavits, and the chattel mortgage was duly registered.

Upon the whole, therefore in my opinion, the chattel mortgage was duly registered and is a good, subsisting and enforceable security to which the plaintiffs are entitled and the appeal should be allowed.

GALLIHER, J.A., agreed with IRVING, J.A.

Appeal dismissed; MCPHILLIPS, J.A., *dissenting.*

SASKATCHEWAN.

ELWOOD, J. OCTOBER 14TH, 1914.

TRIAL.

DURIE v. CAN. PAC. RY. CO.

Railway—Animals at Large Killed on Track—Negligence or Wilful Act or Omission of Owner—Absence of Cattle-Guards—Liability of Railway Company—Dominion Railway Act (R. S. C. 1906, ch. 37, sec. 294, sub-sec. 4.)

Where animals at large through the negligence or wilful act or omission of the owner stray on to the right of way of a railway company and are there injured or killed, the company is not liable in damages, under sec. 294, sub-sec. 5 of the Dominion Railway Act (R. S. C. 1906, ch. 37), and the absence of cattle-guards does not render the company liable even where it is under a statutory duty to maintain them.

Clayton v. *Can. Nor. Ry.*, 7 W. L. R. 721, followed.

An action for damages for the loss of several horses which plaintiff alleged were fatally injured or killed by defendant company's train.

G. E. Taylor, K.C., and N. Gentles, for plaintiff.

W. B. Powell, for defendant.

ELWOOD, J.:—The evidence in this case shewed that the plaintiffs are the owners of section 18, township 16, range 24, west of the 2nd meridian, and the south-half of section 19 in the same township and range; that the Soo Line of the Canadian Pacific Railway Co. runs diagonally in a north-westerly direction through sections 9, 8, 17 and 18 of said township and range, and through section 13 in range 25; that for several miles east and west of the point where the railway crosses the plaintiffs' land the lands adjoining the right of way of the defendant railway company are unenclosed, with the exception that there is a small pasture belonging to the plaintiffs on the north side of the track, which runs down to the defendant company's right of way, that the railway right of way on both sides, where the accident took place and I judge for several miles on either side of where the accident took place, is fenced with a proper and substantial fence; that at the points where the railway crosses the various highways along the line where it is fenced there are cattle-guards, but during the winter season and at the time of the accident these cattle-guards were removed; that the locality in which the railway thus passed is settled and improved; that in the month of January, 1911, six horses, the property of the plaintiffs, got on the right of way of the defendant company where the same crosses section 18, and were killed or eventually had to be shot, and the evidence satisfies me that the animals were so injured or killed by a train of the defendant company. It was admitted at the trial that these horses were worth $1,800. The evidence satisfies me that these animals so got on the right of way probably at the point where the highway between sections 17 and 18 crosses the defendant company's railway, and were proceeding in a westerly direction when struck by the train. No person saw the accident, and the last time the horses were seen was in the evening before, when they were on section 19 going in a north-easterly direction. They were then seen by one of the plaintiffs. For some considerable time these horses, together with other horses, had been pasturing on a field of uncut flax on section 8 in the same township and were there with the consent of the owner of section 8. The evidence shews that animals so pasturing are not likely to stray away. On the morning of the day prior to the accident one of the plaintiffs saw horses which he took to be his being driven away from the pasture, and the evidence shews that these horses were

driven away by a man who was driving some other horses away and these apparently followed him. They came along the south side of the railway and over the road allowance across the railway at the crossing on the west side of section 18. They went on to section 13 immediately west of section 18 and were next seen, as stated above, at 5 o'clock in the evening on section 19. The evidence further shews that horses will be more likely to keep to a beaten trail than to go through deep snow, and at the time of the accident in question there was snow on the ground and considerable storm, although there was apparently no storm in the evening when the horses were last seen. There was a storm that night, or at any rate considerable wind. The evidence shewed that the local improvement council of the district in which the above lands were situated had passed a resolution providing that "herd law" should be in force from 1st May to the 1st December in each year.

Under the above facts there was no duty cast upon the railway company to fence their land or to maintain fences or cattle-guards. It is contended, however, on the part of the plaintiffs that under sec. 294 of the Dominion Railway Act the company are liable. A number of cases were cited to me in support of this proposition. In Parkes v. Can. Nor. Ry., 18 W. L. R. 118, it appears that the animals in question in that action were not at large through the negligence or wilful act or omission of the owner. In McLeod v. Can. Nor. Ry., 18 O. L. R. 616, it was held that the cattle being upon the property of the owner were not at large. In Palo v. Can. Nor. Ry., 29 O. L. R. 413, it was held that the horse when on the plaintiff's land was not at large within the meaning of the Act, and the plaintiff was guilty of no negligence in allowing the horse to pasture upon his own land, and it was the duty of the defendant to maintain the fence between that land and the right of way. In Clare v. Can. Nor. Ry., 17 W. L. R. 536, there was no pretension that the plaintiff's cattle were at large through the negligence of the plaintiff. In Greenlaw v. Can. Nor. Ry., 24 W. L. R. 509, it was held that where the by-laws of a municipality in which the owner keeps his cattle, passed in accordance with the Municipal Act, permit the running at large of the cattle at all times, it is neither negligence nor a wilful act or omission on the part of the owner within the meaning of sub-sec. 4, of sec. 294, for him to allow them to run at large, and

where the cattle, being thus at large, get upon the line of railway through a defective fence, and are killed by a train of the railway company at a place which is not the intersection of the right of way with a highway, the company is liable.

The latter case, however, is quite different from the case at bar. In the case of Greenlaw v. Can. Nor. Ry. (supra), there was a by-law expressly allowing animals to run at large. There was no such by-law or provision which affected the case at bar. The resolution merely provided that the herd law was enforced during certain months, and during certain other months, in the course of which the accident in question took place, the herd law was not in force. The herd law imposed certain penalties, apart from the common law liability, which are incurred by owners of cattle running at large during the prohibited months; but when that law is not in force owners are not thereby given the right to run their cattle at large, but only avoid the penalties prescribed by the herd law during months in which the herd law is in force.

In Can. Pac. Ry. v. Carruthers, 39 S. C. R. 251, at p. 257, I find the following:—

"There is no evidence that they got at large through any negligence or wilful act of the plaintiff or his agent, or of their custodian or his agent, and the sub-section makes the fact that no one was in charge of them immaterial."

The case of Atkins v. Can. Pac. Ry., 18 Man. L. R. 617, does not appear to me to be applicable to this case.

In Higgins v. Can. Pac. Ry., 18 O. L. R. 12, at p. 16, I find:—

"But animals will stray; if this straying is the fault of the owner we shall let him bear the loss if his animals are killed on your line; if, however, he is not to blame, you must pay if you do not keep them off by fence and cattle guards."

In Murry v. Can. Pac. Ry., 1 Sask. L. R. 286, the facts were that the plaintiff left a number of horses in a pasture partially enclosed, being fenced in two sides, bounded by a shallow creek on the third side and unenclosed on the fourth. He had been using this pasture, for the purpose of keeping his horses in over night, for some years, and up to the time in question none had ever strayed out. On this occasion, the horses being left for some days unattended to on account of a severe storm left the pasture. there being no evidence as to how they escaped, and strayed on to the railway of the defendant company where two of them were killed by a train,

and one so seriously injured that it had to be destroyed. It was held that the plaintiff did not take reasonable precautions to safely keep the horses in question and prevent them from getting at large, and could not therefore, under the provisions of the Act, recover.

In Clayton v. Can. Nor. Ry., 7 W. L. R. 721, the facts were briefly the following: On the morning of the accident plaintiff's agent turned several of the plaintiff's horses loose in a field from which there was, to the knowledge of both, free access to the public road through an opening in the fence left by the removal of a gate. The horses passed through this opening and remained at large until some time in the succeeding night, when, having entered the defendants' right of way through a defective gate they were injured by one of the defendants' trains. It was held that the evidence proving that the animals, having got at large by reason of the plaintiff's negligence the defendants were not liable.

In Fair v. Can. Pac. Ry., 9 W. L. R. 202, it was held, following Murray v. Can. Pac. Ry. (supra), that the horses of the plaintiff being at large through the wilful omission of the plaintiff he could not recover.

In Sporle v. Grand Trunk Pacific, 6 W. W. R. 827, it was held that where animals are, through the negligence of their owner, on a highway at a railway crossing and in the charge of no one, and are frightened by a train so that they jump the cattle-guards and go on the right of way and are killed by a train, the question of sufficiency of the railway fences is immaterial, and the railway company are not liable for damages. The facts in that case shewed that there was negligence on the part of the owner of the animals, and as I understand the case it holds that even if there is a duty on the part of the railway company to maintain its fences, yet if the animals of the plaintiff got at large through the negligence or wilful act or omission of the owner, and in consequence are killed, that the plaintiff cannot recover.

In the case at bar, I am of the opinion, and find that the animals that were killed or injured, were at large through the negligence, or at any rate, the wilful act or omission of the owners. The case is quite distinguishable from the cases which held that the railway company are liable where the animals got on the railway companies' lands from lands that the owner is in occupation of or using with the permission of the owner. In the case at bar the animals did not get on

the right of way from any land which was being occupied by the owner, because all of the right of way on either side of the railway up to the highways was fenced, and they must have got on at one of the crossings. While it is quite true that the evidence shews that the animals would not likely stray from section 8, yet the evidence shews that to the knowledge of the defendants the animals did follow other animals off section 8, and were last seen on section 19, and that they would probably go back to section 8. In order to go back to section 8, they would have to go along the public highway, where they had no right to go; they would have to cross the railway tracks at one of the public highways, and the evidence further shewed that the plaintiffs knew that trains of the defendant company were liable to pass along that line of railway. The plaintiffs took no steps to see that the animals were led over the railway safely, but simply allowed them to wander as they saw fit. Under these circumstances, I think there was the greatest negligence on the part of the plaintiffs, and that it is in consequence of their negligence that the animals got on the track.

It was contended that notwithstanding the defendant company were not bound to fence, yet, having fenced, and not having maintained cattle-guards, they were liable. Following the decisions in Clayton v. Can. Nor. Ry. and Sporle v. Grand Trunk Pacific (supra), I am of the opinion that, under sub-sec. 4 of sec. 294 of the Act, and the plaintiffs having through negligence or wilful act or omission allowed the animals to get at large, the fact that there were no cattle-guards does not render the defendants liable.

The result will be that there will be judgment for the defendants, with costs.

MANITOBA.

GALT, J. NOVEMBER 5TH, 1914.

LEDOUX v. CAMERON.

Moratorium Act — Registered Judgment — "Instrument Charging Land With the Payment of Money"—County Courts Act, R. S. M. 1913, ch. 44, secs. 215, 216—Staying Proceedings.

Under sec. 2 of the Manitoba Moratorium Act, September 14th, 1914, proceedings to enforce a sale in an action to realize on a registered county court judgment cannot be gone on with until 1st February, 1915, since, by virtue of secs. 215 and 216 of the County Courts Act (R. S. M. 1913, ch. 44), a registered judgment of a county court is "an instrument charging land with the payment of money" within the meaning of the said sec. 2.

The plaintiff recovered judgment in the County Court on March 7th, 1913, for $198.97, and a certificate of this judgment was duly registered.

In April, 1913, the plaintiff commenced an action in the Court of King's Bench, on his said county court judgment, so registered as aforesaid, asking for a sale of certain lands of the defendant. Final judgment in the action was signed in October, 1913. An order for sale of the lands was issued in 1914. The plaintiff applied to the Master on October 21st, 1914, to settle the advertisement. The master refused, holding that under the Moratorium Act, assented to on September 18th, 1914, the plaintiff was prevented from taking any proceedings until February, 1915.

The plaintiff appealed.

B. L. Deacon, for the appellant.

A judgment does not come within the provisions of the Moratorium Act, it is not an instrument such as is referred to in sec. 2 of the Act. There is no power of sale in a judgment, nor is it an instrument between parties. A judgment in itself does not bind any interest in land, and it is only when a certificate of same is registered that it is a lien or charge on the land, and is so made by statute and not by any

agreement between the parties. In any event, sec. 3 of the Act shews that it only refers to cases in which redemption, foreclosure, or sale has been fixed prior to July 31st, 1914.

GALT, J.:—Under secs. 215 and 216 of the County Courts Act a registered judgment binds and forms a lien and charge on all the lands of the judgment debtor, the same as though charged in writing by the judgment debtor under his hand and seal, with the amount of the judgment.

The plaintiff bases his right to sell the land of his judgment debtor upon Rules 741 and 742 of the King's Bench Act. He is entitled to the relief which he seeks, unless the Moratorium Act prevents it. Section 2 of this Act provides as follows:—

"Notwithstanding any provision in any mortgage of land, or agreement to purchase land or in any other instrument charging land with the payment of money, not including liens under the Mechanics' and Wage Earners' Lien Act, no proceedings for the sale of any land under any power of sale contained in any such instrument or otherwise existing for default in payment of any of such moneys shall be taken by or on behalf of the mortgagee, vendor or other person to whom such money may be payable until after the lapse of six months from the 1st day of August, 1914, if such default took place on or before that date, or until after the lapse of six months from the happening of such default if the same took place after the said 1st day of August, 1914, or takes place after the coming into force of this Act, and any such proceedings now pending are hereby stayed until after the lapse of six months from 1st day of August, 1914, or six months from the date of default if such default took place since the said 1st day of August, 1914. Any sale made or purporting to be made in contravention of this section shall be absolutely null and void. This section shall not affect the sale of land by private sale where before the 1st day of August, 1914, the land has been advertised for sale, and the sale has been abortive and where the mortgage had been in arrears more than six months."

I am of opinion that a registered judgment is included in the words, "or in any other instrument charging land with a payment of money" above referred to in sec. 2 of the Moratorium Act, and that no proceedings for the sale of the

land can be taken by the plaintiff until after the lapse of six months from the 1st day of August, 1914, the default having taken place before that date.

Accordingly I affirm the decision of the referee, and the appeal must be dismissed.

THE

Western Law Reporter

VOL. XXX. TORONTO, APRIL 5, 1915. No. 15

MANITOBA.

FEBRUARY 24TH, 1915.

COURT OF APPEAL.

REX v. LUPARELLO.

Criminal Law — Rape — Offence Punishable by Death — Jurors not Kept Together—Discharge of Jury—New Jury Including Members of Discharged Jury—Duty of Trial Judge—Criminal Code, Secs. 299, 935, 945, 1019.

The prisoner was convicted on a charge of rape. The jury included eight jurors who were members of a jury empannelled on the previous day to try the prisoner but which had, after hearing the evidence of five Crown witnesses, been discharged on the ground that the jurors had not been kept together over night:—

Held, (RICHARDS, J.A., dissenting) that the trial judge was under no duty to exclude from the convicting jury the jurors who were members of the jury which had been discharged.

Held, also, that the mere presence of the jurors in question on the convicting jury did not constitute a substantial wrong or miscarriage under sec. 1019 of the Criminal Code.

Case stated by METCALFE, J.

A. V. Darrach, for prisoner.

John Allen, Deputy Attorney-General, for Crown.

RICHARDS, J.A. (dissenting):—I regret disagreeing with my learned brothers in this case. The wording of sec. 945, that in all cases, in which the accused may, upon conviction, be sentenced to death, the jury shall be kept together, and proper provision made for preventing them from holding communication with anyone on the subject of the trial, seems to me an imperative statutory provision that must be complied with.

It is true that, on discovering that the jury had not been so kept together on an adjournment of the trial, the learned trial judge discharged the jury and called another, and began the trial over again. But on the new jury there were nine jurors who had been on the first one, and who had been allowed to separate after hearing part of the evidence. As to those nine jurors at least the mischief that sec. 945 seeks to guard against had become possible, and, as to them, merely discharging them and allowing them to be again called and sworn made no difference.

It is, however, argued that the accused could have challenged them, when called the second time, either peremptorily or for cause.

The accused had the right under sec. 932, to challenge peremptorily twenty jurors, and it was admitted on the argument that, in this case, he had challenged either 19 or 20, all of whom were other than the 9 in question. If he had exercised the right as to these 9, then he would have been deprived of it as to at least 8 of the other challenges which were his right.

Sec. 935 states the only grounds on which a juror may be challenged for cause. The only one of those that it is claimed would cover the case of these 9, or any of them, is, (b) that any juror is not indifferent between the King and the accused.

I cannot see how the accused could, in this case, challenge any of the 9 on that ground. He knew that they had been allowed to separate, contrary to the provisions of sec. 945, but he had no possible means of knowing whether they, or any of them, had, or had not, during that separation held "communication with anyone on the subject of the trial." It does not seem to me that such a case as this would come within the question of indifference between the King and the accused.

I do not think that sec. 1019 applies. It is true that we can not definitely say that, other than the infraction of the statute, any substantial wrong or miscarriage was occasioned, because we have no means of telling whether the mischief, that sec. 945 sought to avoid, did, or did not, occur. We do know, however, that, as to the 9 jurors in question, the peremptory provision of the statute was not complied with.

Such cases as Rex v. Edwards, 3 Camp. 207, and Reg. v. Beers, 2 Moo. & Rob. 472, do not seem to me, in point. In every such case it will be observed that the discharging and

re-swearing took place without the jury having been allowed to separate, so that no such evil as that aimed at by sec. 945, and which is in question here, could have happened, or been in question.

I think the principles, as to the duty of the trial Judge, stated in Reg. v. Theriault, 2 Can. Cr. Cas. at p. 455, and in Rex v. Long, 5 Can. Cr. Cas. at p. 499, are applicable to this case. With deference, therefore, I am of opinion that it was the duty of the learned trial judge, even in the absence of objections by the accused, or by his counsel, to exclude from the new jury all who had been members of the first one, and that, in the face of the provisions of sec. 945, we can not say that the trial had was a proper one.

I would answer the submitted question in the negative.

CAMERON, J.A.:—This is a case reserved under the Criminal Code by Mr. Justice Metcalfe, who sets forth the facts therein. The prisoner was indicted on the charge of unlawfully having carnal knowledge of a woman, not his wife, without her consent. The question is whether the learned trial judge was right in not excluding from the array the twelve jurors who were called and sworn on the afternoon of Tuesday, November 25th, 1913, and who heard the evidence of several witnesses, but were discharged the next morning on the ground that they had not been kept together over night. Another jury was then called and sworn and the trial proceeded with. Eight of the jurors who sat on the jury who convicted the prisoner were members of the jury sworn the first day. The prisoner was found guilty.

Under sec. 299 of the Code, everyone who commits rape is liable to suffer death. Sec. 945, sub-sec. 4, provides that directions that during an adjournment the jury shall be kept together be given in all cases in which the accused may upon conviction be sentenced to death.

Counsel for the prisoner contended that a manifest and substantial wrong was done him by the fact that the evidence of five witnesses for the Crown was given twice to eight members of the jury, who would thus be unduly and unfairly impressed thereby. But the method adopted in England, according to the cases cited, of discharging and reswearing, eleven jurors, when the twelfth had become incapacitated to act by illness, meets this criticism. See Rex v. Lawrence, 25 T. L. R. 374; Rex v. Ward, 10 Cox 573; Rex v. Edwards, 3

Camp. 207, where eleven judges upheld the trial judge; Regina v. Beers, 2 Moody & R. 472; A. v. Ashe, 1 Cox 150, Halsbury, IX., 370.

Counsel for the Crown relied upon sec. 1019 of the Code, which is as follows:—

"1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted."

It is urged that unless something is positively shewn that some substantial wrong or miscarriage has been occasioned there is no ground for this court to interfere. We were referred to R. v. Harris, 2 Can. Cr. Cas. 75, where a private prosecutor had a conversation with a juror and Wurtele, J., held that that could not avoid the verdict. Also to King v. Ma Hung, 20 Can. Cr. Cas. 40. It is further urged that the prisoner had, when the fresh jury was being called, the right to challenge for cause under sec. 935, sub-sec. (b).

Prisoner's counsel urged that it was the duty of the court, of its own initiative, to exclude all the twelve jurors sworn the first day. He referred to R. v.Theriault, 2 Can. Cr. Cas. 444, at p. 455, Reg. v. Sonyer, 2 Can. Cr. Cas. 501, and to Rex v. Long, 5 Can. Cr. Cas. 493, where Wurtele, J,. at p. 499, defines the duties and functions of the judge at a criminal trial with great clearness. A number of cases, including some of those cited above, are referred to in Tremeear in his notes to sec. 1019.

I must say that it does not seem to me that it was shewn that there was anything not according to law done at the actual trial at which the prisoner was convicted. The trial proceedings commenced on Tuesday became abortive and null upon the discharge of the jury on the following morning. With the swearing of the fresh jury the actual trial, leading up to the conviction, commenced and the calling of some of the jurors sworn on the first jury to act on the second was in no way contrary to law as I see it. But further, there is nothing before us from which we can draw the conclusion that any substantial wrong or miscarriage was occasioned by

the presence of the eight jurors, who had been sworn the first day, on the jury who convicted. We can presume nothing of the kind. On the contrary, our presumption must be, on the wording of the case submitted, that everything was properly done with due regard to the interests of the accused. To find any substantial wrong or miscarriage occasioned at this trial by the presence of the eight jurors in question on the jury, we are driven to the region of imagination altogether. Moreover, the prisoner had, at the trial, the unimpaired right to challenge for cause, and, in my humble judgment, there was no duty cast on the judge at the trial to exclude all the twelve jurors in question from the jury called and sworn on the second day.

I would, therefore, answer the question submitted in the affirmative.

PERDUE, J.A., concurred with the reasons given by CAMERON, J.A.

HAGGART, J.A., concurred with CAMERON, J.A.

BRITISH COLUMBIA.

FEBRUARY 26TH, 1915.

COURT OF APPEAL.

RE WESTHOLME LUMBER CO. LTD. ET AL. V. ST. JAMES, LTD.

Building Contract—Non-Completion at Fixed Date—Demurrage — Certain Sum per Day Payable by Contractor for Delay — Extension of Time for Completion upon Ordering of Additional Work — Penalty or Liquidated Damages—Reservation by Owner of Right to Make Alterations or Additions — When to be Exercised—Discrepancy Between Specifications and Contract—Falsa Demonstratio Non Nocet.

Where a building contract contains a stipulation making the contractor liable to pay liquidated damages for every day exceeding the date fixed by the contract for completion, with a provision that the said date be extended upon the ordering of additional work, the contractor is liable for the number of days' delay less the time allowed for the performance of the additional work.

McLeod v. *Wilson*, 2 Terr. L. R. 312, referred to.

Where the owner reserves the right to make alterations or additions, he may reasonably exercise the said right up to the last minute of the completion of the work.

Where the time fixed by the contract for the completion of a building is different than the time fixed by the specifications, the latter, if clearly erroneous, may be rejected upon the principle of *falsa demonstratio non nocet.*

An appeal by the plaintiff from the judgment of CLEMENT, J., of April 4th, 1914.

The appeal was heard by MACDONALD, IRVING and MCPHILLIPS, JJ.A.

A. H. Macneill, K.C. (R. M. Macdonald with him), for plaintiff, appellant.

H. B. Robertson (Moore with him), for defendant, respondent.

IRVING, J.A.:—The owner having exercised his alleged right to deduct penalties for a delay in the completion of the work, this action was brought to recover the balance due in payment for the work..

The plaintiffs' main contentions are: (1) that owing to the wording with reference to the time limit in the contract being inconsistent with those used in the specifications, the condition as to penalties was void; and (2) that, in any event, the addition of extras ordered by the architect destroyed the time clause so far as penalties were concerned.

As I have reached the conclusion that the discrepancy is of no importance for reasons which I shall give later, I shall, on the assumption that the term in the contract as to the time clauses prevails, deal with the second point.

The plaintiffs by a contract, dated 17th January, 1912, contracted to erect and complete for the defendants a six-storey and basement re-enforced concrete hotel building. The defendants were to do the preliminary or general excavation work. The owners reserved the right to make any alterations or additions. The amount to be paid therefor, was to be stated in the orders authorising such alterations, or additions. In the event of disagreement the amount was to be determined by arbitration.

By Article 2 the work was to be done under the direction of architects, whose decision as to the construction and meaning of the drawings and specifications should be final.

By Article 9, the price was fixed at $74,121, subject to additions and deductions as in the contract provided, to be paid upon certificates of the architect.

By Article 6 the reinforced concrete frame and the roof were to be completed within seventy days after completion of the excavation. The date of completion of the excavation was 23rd February. The entire work was to be completed within 160 working days after completion of the excavation. This date the architect ultimately fixed as 15th October, but it was not completed till the end of December.

Article 7 was as follows:—

"Article 7. Should the contractors be delayed in the prosecution or completion of the work by the act" (this word in my opinion having regard to the owner's power to make additions and alterations would include the giving of orders for such alterations and additions) "neglect or default of the owners, of the architects, or of any other contractor employed by the owners upon the work, or by any damage caused by fire or other casualty for which the contractors are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the contractors, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the architects, but no such allowance shall be made unless a claim therefor is presented in writing to the architects within forty-eight hours of the occurrence of such delay."

In the general conditions of the specifications, provision was also made for an extension of the time limit, at the architect's discretion, in the event of a delay occurring (a) through a general strike of mechanics employed on the works, or (b) on account of prolonged spell of inclement weather.

Under Article 7 of these conditions the architect allowed 64 days extension for one cause or another on application by the plaintiffs.

"Article 8. The owners agree to provide all labor and material essential to the conduct of the work not included in this contract in such manner as not to delay progress, and in the event of failure to do so, thereby caused loss to the contractors, agree that they will re-imburse the contractors for such loss, and the contractors agree that if they shall delay

the progress of the work so as to cause loss for which the owners shall become liable, then they shall reimburse the owners for such loss. Should the owners and contractors fail to agree as to the amount of loss comprehended in this article, the determination of the amount shall be referred to arbitration as provided in Article 12 of this contract.

"Article 3. No alterations shall be made in the work except upon written order of the architects, the amount to be paid by the owners or allowed by the contractors by virtue of such alterations to be stated in said order. Should the owners and contractors not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Article 12 of this contract.

Arbitration was provided for by Article 12, but the arbitration proceedings proved abortive and the plaintiffs thereupon sued: (1) for $18,138.87, the balance they claimed, made up as follows:—the $74,121 and $12,304.86 for additional work performed and additional material supplied, and certain other matters, bringing their total claim up to $92,791.51, less credits $74,652.64; and (2) for damages for breach of contract. The defendants admitted that work had been done to the extent of $84,914.41, and paid into court $8,000, being the balance due after deducting (1) the before-mentioned credits allowed by the plaintiffs, and (2) a further sum of $3,200, which they claimed to deduct as demurrage for 64 days at $50 per day, i.e., from 16th October to 31st December.

This charge of demurrage was based on the following clauses in the specifications:—

"The building shall be turned over to the owners, broom clean and complete in every detail, within 160 working days after the signing of the contract.

"The owners will pay a bonus of $50 per day for each and every day that the building is completed before the expiration of the time limit.

"The contractor shall pay a demurrage of $50 per day for each and every day required to complete the building over and above the time limit."

In addition to the contract of the 17th January, 1912, the plaintiffs were authorized by letter dated 29th January, to complete the excavation which the owners had already

commenced, and on the 31st May, 1912, the plaintiffs were authorized to proceed with the additional work and material required to make the roof of the six storey building into a new (or 7 storey) building according to specifications prepared by the architects.

The learned judge found that according to the architect's certificate, 18th April, 1913, the plaintiffs were entitled to $7,907.72, and also by admission in pleadings to a further sum of $71.70, and as the total $7,979.42 was $20.58 less than the amount the defendants had paid into court, judgment was given on that basis. He declined to allow interest on $7,979.42 from the date of completion to judgment. No appeal was taken from this refusal of interest.

The learned judge apparently thought the word demurrage was to be read as and for liquidated damages, and that as there was an extension of time provided for, to be granted by the architects in the event of extra work being ordered, he allowed the deduction. He fixed the actual completion of the excavation as the 23rd February, and of the building as 31st December, and held the days claimed for demurrage were properly charged at 64 days.

The points taken before us in connection with the extra work were (1) the extras had destroyed the time limit, so far as the penalties were concerned, and (2) in any event the plaintiffs had not been allowed enough for extras and had been charged 14 days too much for demurrage, as according to the plaintiff's case the excavation was not finished till 9th March.

Mr. Macneill contended that although this "demurrage" might be liquidated damages (see on this point Clydebank Engineering Co. v. Don Jose, &c., [1905] A. C. 6) the penalty clause must be construed strictly, for the exact contract, citing Dodd v. Churton, [1897] 1 Q. B. 562, 66 L. J. Q. B. 177, and that as the date of completion of excavation was arbitrarily fixed by the architect, before, as he contended, it had been in fact completed, the plaintiffs were relieved from the penalties for delay.

That contention is not supported by the facts. The facts in connection with the basement and its completion are these: there were three kinds of excavations to be made (1) the preliminary or general, which was to be done by the owners; (2) sub-basement, which was an extra; and (3) the elevator pit and footings which were in the contract.

The general excavation work was committed to plaintiffs' care on 29th January, 1912. On 20th February they undertook to do extra work, and asked for 6 days extension of time on the contract on that account.

The architect told them to go ahead and formally on 22nd February, 1887, accepted their offer and then informed them that he had granted an extension and that the time fixed for the starting of the contract would now be 23rd February. The general excavation was then complete but this sub-basement extra work was continued for some time after the 23rd February and was done by them in conjunction with their other contract work. That this combined sub-basement extra and the latter contract was not completed till 9th March is true, but I think there was evidence from which the judge could reach the conclusion that the general excavation was finished on the 22nd February.

Howe v. Cuppy (1838), 3 M. & W. 387, was a case where the owner sought to enforce the provision for penalties where a portion of the delay in the completion of the work was due to his default; but as in that case the delay was caused by the owner and there was nothing to shew they had entered into a new contract to perform the work at four and a half months ending at a later late, the parties were at large, and it was held that the contractors should forfeit nothing for the delay. The delay here not being the fault of the defendants, that case can have no application particularly in view of Article VII.

The memorandum kept by the plaintiffs' foreman shews that on the 23rd February they "started the contract at noon to-day." Further, there was no claim made under Article 8 for any delay on the part of the owner in respect of the general excavation.

With regard to the contention that the extras destroyed the provisions relating to the time limit, it must be conceded by the defendants that the extras were very heavy, including $6,800, for the additional storey ordered on 31st May, 1913.

At that date, the 160 days were running. The architects thought that this extra could be made a part of the general contract and by allowing twenty additional days for this work (as well as the additional time required to procure reinforcing steel) hold the contractors to the con-

dition as to demurrage. For this the architect relied on Articles II., III. and VII.

Mr. Macneill argues that as the addition to a 6 storey building of a new storey was quite beyond the intention of the parties to the contract, the architect could not by extending the time prevent the order for this alteration from operating as a waiver by the owner of his right to penalties.

By the order of 31st May, 1912, authorizing this new work, the architect wrote that this work was to be a part of the general contract and fixed the price and extended the time for completion on that basis.

The plaintiffs did not object to the work being added, but sought and obtained a variation in the specifications. I think what was written in this connection satisfied the condition in the specifications that additional cost for extra work, changes, alterations or deductions, shall be agreed on and a written agreement effected. The cases are discussed in Dodd v. Churton, supra, and in my opinion this contract by virtue of Art. 7 falls within the class referred to at p. 524 of Hudson on Building Contracts. See also McLeod v. Wilson, 2 Terr. L. R.

Then assuming the principle is determined against him Mr. Macneill contends, in detail, that allowance was not made for the time in obtaining the steel. This complaint rests wholly on the evidence of the architect who says that although they said they would be delayed no time was asked for under Article 8. It is quite possible that the changes which were made at the plaintiffs' request obviated any delay on that account; at any rate no claim was made under Article 8, and I can see no ground for saying that the plaintiffs are now entitled to an allowance.

As to the strike of the marble setters, the condition above set out provides for an extension of time through a general strike of the mechanics employed on the works. The strike relied on by the plaintiffs took place at Tacoma and in any event the giving of an extension was a matter entirely in the discretion of the architect.

The last objection under this head is that after 15th October, 1912, the date fixed for completion when the time was already running against the plaintiff for penalties, the architect gave orders for additional extra work.

By the conditions in the specifications the owner had reserved the right to make any alterations or additions. No

doubt this power ought to be reasonably exercised, but if exercised reasonably the power would be exerciseable up to the last minute of the completion of the work: see the opinion of Phillimore, J., in Sattin v. Poole (1901), 2 Hudson, 314-5; and it was a matter that could be met by a further extension of time. The orders complained of were given long before the other work was finished.

Taking up the second main contention that the contract was void so far as demurrage was concerned for uncertainty by reason of the inconsistency, between the contract and specifications, as to whether the 160 days for completion, was to count from the completion of the excavation (23rd February) or the signing of the contract, Mr. Macneill contended that it was an ambiguity, but an ambiguity I think is where one expression is capable of two meanings.

There is a repugnancy, as I understand it, where one clear clause contradicts another clause equally clear. In a deed where there is a repugnancy the rule in the first shall prevail, but in a will the second: Doe d. Leicester v. Biggs (1890), 2 Taunt. 113, cited in Beale, 2nd ed., at p. 189.

In my view of the matter it matters not whether this is ambiguity or repugnancy, because the plaintiffs elected to regard the time of the completion of the excavation as the starting point: and the question fought out at the trial was whether the excavation was completed on the 9th March as the plaintiffs contend, or the 23rd February as the defendants contend.

If the matter were to be determined on the question whether this is a repugnancy or an ambiguity, I would decide that the repugnancy rule is applicable, but I would determine it on another ground. The 6th Article of the contract fixes the time for completion with particularity; the object of the clause in the specifications is to prescribe the condition of the building when completed, that is "broom clean" and "complete in every detail." The addition of the words which create the discrepancy, viz.: "within 160 days after the signing of the contract" are superfluous and may be rejected. The function of the clause would be performed if the sentence ended at the word "detail." The addition of the discrepant words does not set out fully the time limit, because the time limit was not to be 160 working days, but 160 working days plus such allowances of time

as should be made by the architect on the contractor's application.

The foundation of common sense upon which the maxim falsa demonstratio non nocet with reference to parcels rests will I think support my view. Here we have the contract which renders certain what is intended to be the time limit and the erroneous statement in the specifications of that time limit cannot alter it.

The plaintiffs rely on Ex parte Vince, [1892] 2 Q. B. 478, 61 L. J. Q. B. 836. The intention in that case of the parties could not be determined, and the agreement was unintelligible, and other cases relating to vague, indefinite and illusory contracts. These cases have no application when the intention of the parties is clear and definitely expressed.

I would dismiss the appeal.

McPHILLIPS, J.A.:—This is an appeal from the judgment of Mr. Justice Clement in a building contract action. The hearing took place before the learned judge without a jury and extended over the period of 5 days. The evidence is at great length, yet the case may be considered and passed upon in appeal without the discussion in detail of any of the evidence, viewing it as I do, that is, that it is essentially a case to be determined upon the facts as adduced at the trial and no questions of law in my opinion arise to in any way warrant the disturbance of the findings of fact of the learned trial judge.

The action was launched for moneys due and payable by the defendants to the plaintiffs upon a building contract, $18,138.87 being claimed. The learned trial judge found to be due to the plaintiffs the sum of $7,979.42, and it is from this judgment the appeal is taken by the plaintiffs. The main contentions advanced are that extras were not allowed for and that the allowances made for penalties on account of delay in completion of the building as provided in the contract were wrongly allowed and should not have been deducted from the plaintiffs' claim.

The learned trial judge did not arrive at the same conclusion as was arrived at in Bush v. Whitehaven (1888), 52 J. P. 392, i.e., that the case was one which, owing to the circumstances, would not admit of the application of the conditions of the contract, but that the conditions of the

contract were applicable. I cannot see any reasonable ground upon which to differ with the learned trial judge.

The learned counsel for the appellants in his able argument strenuously maintained that there was such ambiguity in the contract that the penalties for delays could not be allowed, that is that Article 6 of the contract provided that the building was to be completed within 160 days after the completion of the excavation, which work was to be done by the owners, whilst under the specifications and general conditions forming a part of the contract the building was to be completed in every detail within 160 working days after the signing of the contract. In my opinion these provisions must be looked upon as being repugnant to each other. Article 6 is contained in the contract itself, and should in my opinion prevail. It is manifest that that was the real intention, plainly ascertainable from the contents of the deed. How unfair to the contractor it would be to have the computation commence from the signing of the contract when construction could not be begun until the excavation was carried out, and this work was to be done by the owners.

In Walker v. Giles (1848), 6 C. B. 662 (77 R. R. 425), Wilde, C.J., at p. 702, said:—

"As the different parts of the deed are inconsistent with each other the question is to which part effect ought to be given. There is no doubt that applying the approved rules of construction to this instrument, effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected; and so construing the deed the court is of opinion that the latter part importing a demise cannot have the effect without defeating the intention of the parties."

Seaman's Case (1611) Godb. 166; Parkhurst v. Smith (1742), Willes, 327, at p. 332.

Holme v. Guppy (1838), 3 M. & W. 387-390, 49 R. R. 647, was strongly relied upon on the part of the appellants as being an authority which disentitled the penalties or demurrage being allowed, but it will be observed that that case proceeded upon the fact that the promisee had rendered performance of the contract within the time stipulated impossible. Parke, B., at p. 389, said:—

"Then it appears that they were disabled by the act of the defendants from the performance of that contract; and there are clear authorities that if the party be prevented by

the refusal of the other contracting party from completing the contract within the time limited, he is not liable in law for the default."

Lodder v. Slowey (1904), 73 L. J. P. C. 82, A. C. 442, 453. Further, the contract now under consideration makes special provision with regard to extending time for the completion of the work consequent upon any delay caused by the owners, and it would appear that all proper allowances were made in this regard or at any rate all asked for, twenty days in all further time being given for completion.

Then Dodd v. Churton [1897] 1 Q. B. 563, 66 L. J. Q. B. 477 (C.A.), was cited as being an authority which would govern in the determination of this appeal. In my opinion, however, the case falls within the principle defined in Jones v. St. John's College Oxford (1870), L. R. 6 Q. B. 115, 124, 40 L. J. Q. B. 80. Mellor, J., at p. 85 in the Law Journal report said:—

"The universal rule is that no stipulation can be implied which is at variance with the express terms of the contract. The express undertaking on the part of the plaintiffs here is to complete the works within a specified time or pay a penalty; they have not complied with their undertaking and therefore they must pay the penalty."

In Scott v. Bell (1900), 38 S. L. R. 217, Jones v. St. John's College, supra, and Dodd v. Churton, supra, were both referred to. Under the terms of the contract in that case the whole work was to be "entirely completed" by May 1st, 1897, under a penalty of 10s. per day. It was proved that extra work was ordered during the progress of the operations and that even some of this extra work was ordered after May 1st, 1897, and it was held (Lord Young doubting), that the fact that some of the extra work had been ordered after May 1st, 1897, did not of itself prevent the enforcement of the penalty clause, that onus had not been discharged of shewing that the extra work had been the cause of delay in completing the work, and that the penalty was rightly entitled to be deducted. (Emden's Building Contracts, 4th ed. (1907), at pp. 186, 187.)

In McLeod v. Wilson (1897), 2 Terr. L. R. 312, Scott, J. had under consideration a contract of somewhat similar terms, and it was held as set forth in the headnote at p. 312, that "a provision in a building contract for liquidated damages for non-completion within the prescribed time, sub-

ject expressly to a further reasonable length of time for delays caused by changes in the plans and specifications is not discharged by delays caused by such changes." Scott, J., at p. 321, said:—

"Certain changes were made by the architect in the plans and specifications which caused delay in completion, but in my opinion these changes and the consequent delay did not constitute a waiver of the penalty clause except to the extent of the delay thereby caused. I would be inclined to hold otherwise were it not for the fact that the contract provides that reasonable extensions of time for completion shall be allowed on account of such delays, and that such extentions shall be taken into consideration in fixing the penalty. The contracts in question in the English cases in which it was held that delays caused by changes in plan will avoid the penalty clause, contained no such provision and it would seem that the provision is designed to overcome the effect of these decisions."

Some argument was addressed to the question as to whether the demurrage of $50 per day could be looked upon as liquidated damages. It was not stated to be liquidated damages, yet that statement has been held not to be conclusive. See Law v. Local Board of Redditch, [1892] 1 Q. B. 127; Strickland v. Williams, [1889] 1 Q. B. 382.

Cape of Good Hope Government v. Hills (1906), 22 T. L. R. 589, was a case in the Privy Council, Sir Arthur Wilson, at p. 590, said:—

"The contention of whether a sum—whether it is called penalty or liquidated damages—is truly liquidated damages and as such not to be interfered with by the court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for, can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. The indicia of that question would vary according to the circumstances. Enormous disparity of the sum to any conceivable loss would point one way—while the fact of the payment being in terms proportionate to the loss would point the other. But the circumstances must be taken as a whole and must be viewed as at the time the bargain was made. Applying that principle to the present case their Lordships were unable to come

to the conclusion that the sum here could be taken as a genuine pre-estimate of loss."

Bearing in mind this canon of construction as determined by the Privy Council, in my opinion upon the facts of the present case the demurrage of $50 per day can be taken "as a genuine pre-estimate of loss," and the learned trial judge properly allowed it.

I think, therefore, that the judgment of the learned trial judge was right, and that the appeal should be dismissed.

MACDONALD, C.J.A., agreed with IRVING, J.A.

Appeal dismissed.

SASKATCHEWAN.

LAMONT, J. JANUARY 30TH, 1915.

TRIAL.

CRICHTON'S LTD. v. GREEN.

Landlord and Tenant — Agreement for Lease — Entry — Refusal of Lessor to Carry Out Terms of Agreement — Exclusive Possession not Given — Rescission — Rights of Parties Under Agreement After Entry and Payment of Rent.

An agreement for a lease of a store and the basement thereof loses its binding effect upon the refusal of the lessor to give to the lessee exclusive possession of the said basement.

General Billposting Co. Ltd. v. *Atkinson*, [1909] A. C. 118, referred to.

A tenant who enters and pays rent under an agreement for a lease of which specific performance would be decreed is in the same position as if the lease had been executed.

Walsh v. *Lonsdale* (1882), 21 C. D. 9, followed.

H. D. Pickett, for the plaintiff.

H. S. Lemon, for the defendant.

LAMONT, J.:—Notwithstanding the vigorous argument by Mr. Pickett in this action, I am of opinion that it must be dismissed. By an agreement in writing, dated January

14th, 1913, the plaintiff agreed to lease and the defendant agreed to take a lease from the plaintiff, of a store on Fairford street together with 15 feet of the basement the full width of the store, for two years at a rental of $175 per month. The building was then being erected, and the lease was to be entered into as soon as the premises were completed. Before the basement was completed the defendant moved into the store. This was on May 21st, 1913. As soon as the basement was completed, which was at the end of that month, he wanted possession of the basement and a key therefor. The plaintiff allowed him to put his goods in the basement but did not give him at that time the key; but they also put bolts on the inside of the basement door and kept that door bolted. The defendant had no entrance to his basement from his store but had to enter from the cellar hall. The defendant's basement connected on the inside with the plaintiff's basement, so when the plaintiff bolted the door the defendant could not enter his portion thereof until the plaintiff went down and opened the door. At 6 o'clock at night the plaintiffs were in the habit of closing their store. The defendant was in the confectionery business and kept open until midnight. The use of the basement until he closed was of material importance to him. The reason the plaintiffs kept control of the defendant's portion of the basement was because they desired to use the defendant's basement as a passage way for goods to their basement, and because they said they had silverware in their own basement, their's being a jewelry business, and they could not take the risk of leaving the defendant's basement unlocked as there was only a board partition between the two. They not only refused to give the defendant exclusive possession but in their evidence admitted that they intended to continue to use the defendant's basement as a passage way for their goods.

The defendant kept insisting upon the terms of the agreement and notified the plaintiffs on July 29th that unless he received a lease and legal possession of the portion of the basement as set out in the agreement he would move from the premises. In their statement of claim the plaintiffs allege that on or about the 14th August they tendered to defendant a lease upon the premises under the agreement but the defendant refused to execute it. The defendant admits the tender of the lease and alleges that he refused to execute it because he could not get the possession of the basement.

The plaintiffs put in evidence of a tender of the lease but did not produce the lease so that it could be determined whether or not it was in accordance with the terms of the contract. As the plaintiffs admit that they intended to continue the use of the defendant's portion of the basement as a passageway for their goods I take it that that lease did not convey to the defendant exclusive possession of that portion of the basement which was to be his under that agreement. The onus was on the plaintiffs to prove that the lease tendered corresponded with the agreement, and they failed to prove it. The defendant moved out and the plaintiffs now sue for the rent subsequently falling due.

The principle of law governing the right of one party to a contract to treat the contract as at an end for breach by the other party of its provisions is laid down by Lord Coleridge, C.J., in Freeth v. Burr (1874), L. R. 9 C. P. 208, as follows:

"In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict among them. But I think it may be taken that the fair result of them is as I have stated; that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

The statement of law as laid down by Lord Chief Justice Coleridge was approved of by the House of Lords in General Billposting Co. Ltd. v. Atkinson, [1909] A. C. 118.

In Rhymney Ry. Co. v. Brecon & M. T. Ry. Co. (1900), 49 W. R. 116, Lord Alverstone says:—

"It will be well to consider in the first instance what conduct on the part of one party to a contract justifies the other party in treating it as at an end. If there is a distinct refusal by one party to be bound by the terms of a contract in the future, the other party may, in our opinion treat the contract as at an end."

Was there then in this case a distinct refusal on the part of the plaintiffs to carry out the terms of their contract, which entitled the defendant to a lease of the basement as well as the store premises? Unquestionably, I think there

was. They not only kept control of the basement but declared that they could not give exclusive control thereof to the defendant. Its use was most material to him, and their refusal to leave the door unbolted so that the defendant could use it at will, and their using it as a passage way to their own basement, indicated in the clearest manner an intention not to be bound by the agreement they had entered into under date of January 14th. The defendant, therefore, was justified in considering the contract at an end and moving out. With the contract at an end, the action for subsequent rent must fail.

The argument addressed to me by Mr. Pickett was this: that where a tenant, under an agreement to lease, entered and paid rent, he was in the same position as if the lease had been executed, and he cited Halsbury, 441, which reads:—

"Thus, upon an entry under an agreement for a lease, followed by payment of rent, the tenant becomes a yearly tenant upon such of the terms of the agreement as are consistent with that tenancy."

Now, it will be observed here that what is necessary in order to make that statement of the law applicable is an entry under an agreement for lease. Now in this case there was not an entry under the agreement for lease as was contemplated by the agreement. The whole trouble, so far as the defendant was concerned, was that he was not allowed to enter, that he could not get exclusive possession of the basement. It therefore becomes necessary to ascertain under what circumstances an agreement for a lease imposes upon the tenant the same obligation as if the lease had been executed. In Walsh v. Lonsdale (1882), 21 C. D. 9, Sir George Jessel, M.R., laid the rule down in the following language:—

"A tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed. He is not since the Judicature Act a tenant from year to year, he holds under an agreement, and every branch of the court must now give him the same rights."

In Lowther v. Heaver, 41 C. D. 248, Cotton, L.J., says:

"Speaking for myself, I should say that a tenant occupying under an agreement of which a court of equity would grant specific performance, has the same rights as if the lease had been granted."

The condition, therefore, upon which a tenant will be held to have the same rights and be under the same obligations as if the lease had been granted is that he enters under an agreement of which specific performance would be ordered. And that principle seems to be laid down in the volume of Halsbury referred to, at p. 367, where the learned author in dealing with agreements for leases, says:—

"If, however, a question of the legal rights and liabilities of the parties arises in a court which has jurisdiction to order specific performance of the agreement, and if the agreement is one of which specific performance will be ordered, then the parties are treated as having the same rights, and as being subject to the same liabilities as if the lease had been granted."

Would any court have granted to the plaintiff as against the defendant specific performance of the agreement in question? In my opinion most assuredly it would not. In order to obtain specific performance the plaintiffs would have to plead and shew that they had been at all times, and were still ready to perform all the obligations which the contract cast upon them. In this case the evidence shews that they were not, that they never had been, and were not at the time they brought the action ready and willing to perform the obligations under the contract devolving upon them. They were not ready to give the defendant exclusive possession of the basement as called for in the agreement, and I think the following sentence in the paragraph relied upon by Mr. Pickett throws considerable light upon the principle applicable, where it says:—

"And the agreement so far controls the implied tenancy that the tenancy ceases without notice to quit at the end of the agreed term."

In my opinion the logical conclusion to be drawn from that is that if the agreement is one of which not only shall specific performance not be granted, but which the defendant was entitled to treat as at an end, the implied tenancy must fall with the agreement. The position taken by the plaintiffs is simply this. They practically say to the defendant, "True, we entered into an agreement for a lease by which you were to get the exclusive possession of the store and of the basement. Subsequently we found that it was necessary for our own business that we should keep control of the basement and we are not therefore willing now to carry out that contract,

nevertheless, you have got to go on and pay your rent, and for whatever damages you suffer you may bring an action for damages." That position I do not think is sound. There will therefore be judgment for the defendant with costs.

MANITOBA.

GALT, J. MARCH 12TH, 1915.

MICKELSON SHAPIRO CO. LTD. ET AL. v. MICKELSON DRUG AND CHEMICAL CO. LTD. ET AL.

Injunction—Ex Parte Motion to Continue—Case made out by Affidavit not Corresponding with Allegations in Statement of Claim—Material Misrepresentation—Dissolution of Injunction—Remedy of Plaintiff.

The case made out by the affidavit on an *ex parte* motion for an interim injunction must correspond with the allegations in the statement of claim.

***Burton* v. *Blakemore*, 2 Jur. 1062, referred to.**

Where the case made out by the affidavit on an *ex parte* motion for an interim injunction does not correspond with the allegations in the statement of claim, the injunction will be dissolved, but the plaintiff will not be precluded from amending the statement of claim and applying for an injunction on the merits.

***Fitch* v. *Rockford*, 18 L. J. Ch. 458, followed.**

Motion made by plaintiffs to continue an interim injunction granted by PRENDERGAST, J., on February 19th. 1915.

E. Anderson, K.C., and R. D. Guy, for plaintiffs.

A. E. Hoskin, K.C., for defendants.

GALT, J.:—The action is brought for an injunction to restrain the defendants from manufacturing, advertising, offering to sell, or trading in any preparations under the name of "Mickelson's Kill-Em Quick Gopher Poison," etc., and for delivery up or destruction of labels and other documents or advertisements in the possession or power of the defendants and for an account of profits made by the defendants in selling their preparations, and for damages.

The plaintiffs obtained their injunction ex parte and they were, therefore, bound in their affidavit or affidavits to fully and fairly state the case within their knowledge so

that the court might see that prima facie the granting of an injunction would be fair in the aspect in which it was presented to the court. There must be no concealment or misrepresentation, but all the facts must be brought before the court which are material to be brought forward. See Kerr on Injunctions, 5th ed., 551, and cases cited.

The only affidavit filed by the plaintiffs on their original application was one by Leo Shapiro, in which he says that he has carefully read over the allegations contained in the statement of claim, and that the same are true in substance and in fact. It is true that the learned judge who granted the injunction gave leave to the plaintiffs to file and read further material upon the return of a motion to continue the injunction, and that much further material was subsequently filed. It is only in rare cases that a party should be absolved from filing his complete material when he resorts to an ex parte application. The danger of swearing to a general verification of a statement of claim is well exemplified in the present case. The statement of claim contains, amongst others, the following allegations: "3. On the 25th day of May, 1909, the said Mickelson Company caused to be duly registered in Trade Mark Register, No. 56, folio 13708, in the Department of Agriculture at Ottawa, a specific trade mark to be used in connection with the sale of the said gopher poison, consisting of an oval cut in which appeared four gophers in the grass, one of which has its front paws resting on the head of a cylindrical can bearing he words 'Mickelson's Kill-Em-Quick Gopher Poison Trade Mark.'

"4. On or about the month of October, A.D. 1912, the defendant Anton Mickelson, being the sole owner of the assets of Mickelson Chemical Company and of the trade mark in question, for valuable consideration, sold and transferred to the plaintiff company, the said business of manufacturing and selling gopher poison, including the said trade mark, and by instrument in writing bearing date the 2nd day of October, 1912, and duly registered in the said Trade Mark Register, No. 56, folio 13708, the said defendant Anton Michelson duly assigned the said trade mark to the plaintiff company, which is now the owner thereof, as well as of the said business.

"5. The Mickelson Chemical Company and the plaintiff as his successor have duly complied with all the requirements of the law respecting trade marks, and the said trade mark,

and the registration and assignment thereof, were valid and subsisting and in full force and effect, and were so at the time of the acts of the defendants hereinafter complained of.

"6. The plaintiff company has the exclusive right to use the said trade mark, and has since the date of the said assignment exclusively used the same in its trade, business, occupation and calling for the purpose of distinguishing and designating gopher poison manufactured and produced by it, and the said gopher poison has acquired a very valuable and extensive reputation for excellence in the purposes for which it is so manufactured and sold."

On the 23rd of April, 1914, the plaintiffs brought an action against the defendants in the Exchequer Court of Canada, alleging that on the 25th day of May, 1909, the Mickelson Chemical Company had caused to be duly registered in the Trade Mark Register, No. 56, folio 13708, in the Department of Agriculture at Ottawa, a specific trade mark to be used in connection with the sale of gopher poison, consisting of an oval cut in which appear four gophers in the grass, one of which has its front paws resting on the head of a cylindrical can bearing the words "Mickelson's Kill-'Em-Quick Gopher Poison—Trade Mark."

The plaintiffs further alleged that on the 16th day of March, 1914, the defendant company registered in the Trade Mark Register, No. 79, folio 19498, in the Department of Agriculture at Ottawa, in accordance with the provisions of the Trade Mark and Design Act, a specific trade mark for gopher poison, the alleged trade mark being described as follows: "The specific trade mark consists of the words 'Kill-Em-Quick,' hyphenated as above written, accompanied by the facsimile signature of the owner, preferably across the words 'Kill-Em-Quick.' The letters may be in red as shewn in the drawing of the specific trade mark hereunto annexed, or other coloured ink as may seem preferable."

In that action the plaintiffs claimed,—an injunction restraining the defendants from the use of the plaintiffs' trade mark or any part thereof, etc.; damages for the infringement of the plaintiffs' trade mark; and an order directing that the registration of the trade mark by the defendant company in Register No. 79 might be expunged.

Judgment was delivered in the said action by Mr. Justice Cassels on December 19th, 1914. From this judgment it appears that the plaintiffs' application for a trade mark was in part as follows:—

"The said specific trade mark consists of an oval cut in which appear four gophers in the grass, one of which has its front paws resting on the head of a cylindrical can." The application for the plaintiffs' registration in addition to the statement of what the said specific trade mark consists of, has the following,—

"A drawing of the said specific trade mark is hereunto annexed." When the drawing is referred to, there appears to be written on the cylindrical can in small letters the words "Mickelson's Kill-Em-Quick Gopher Poison." In reference to this Cassels, J., said: "If these words form part of the plaintiffs' trade mark I would grant him relief, but I do not see how it can be held that they form part of the trade mark in question. The statute is specific in requiring a description. The description is specific in its terms, and does not claim these words as part of the trade mark. According to patent law it is clearly settled that in regard to a patent it is the specification which governs, and the drawings are merely for the purpose of illustration. . . .

"In an application for a trade mark the drawings might disclose more than the applicant desires to claim as a trade mark, but in my judgment where the application is described as in the trade mark upon which the plaintiff relies, it cannot be extended by reason of something appearing on the drawing which has not been claimed."

The statement of claim in the present case was issued on February 19th, 1915, two months after the giving of said judgment. Yet the plaintiffs, in paragraph 3 of their statement of claim, above quoted, distinctly assert that their specific trade mark as registered included the works "Mickelson's Kill-Em-Quick Gopher Poison—Trade Mark."

This untrue statement is continued throughout paragraphs 4, 5 and 6, (in words which I have italicized) and it was a most material misrepresentation.

The case made out by the affidavits on the motion must correspond with the allegations in the statement of claim: See Burton v. Blakemore, 2 Jur. 1062.

For the above reason, I am of opinion that the defendants are entitled to have the interim injunction dissolved. I purposely say nothing respecting the application in other respects. My decision will not preclude the plaintiffs from applying for another injunction on the merits: See Fitch v.

Rochford, 18 L. J. Ch. 458, where the Lord Chancellor decides this point during the argument.

The plaintiffs are at liberty to amend their statement of claim as they may be advised.

The defendants are entitled to their costs of the motion.

MANITOBA.

MARCH 18TH, 1915.

COURT OF APPEAL.

HOGG v. HOGG.

Fraudulent Conveyance—Voluntary—Action to Set Aside—Statute of Elizabeth—Absence of Fraud—Indebtedness Neither Existing Nor Contemplated at Time of Making Conveyance.

Judgment of GALT, J., 29 W. L. R. 623, affirmed.

Appeal from the judgment of GALT, J., 29 W. L. R. 623.

The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON, and HAGGART, JJ.A.

The judgment of the court was delivered by

RICHARDS, J.A.:—We adopt the judgment of the learned trial judge. In our opinion he has therein so dealt with both the facts and the law that we can see nothing to add to or detract from it.

The appeal is therefore dismissed with costs.

Appeal dismissed.

MANITOBA.

MARCH 12TH, 1915.

COURT OF APPEAL.

REX v. KUZIN.

Criminal Law—Evidence — Witness — Competency—Person Under Sentence of Death — Attainder — Criminal Code, secs. 977, 1033, 1064.

A person confined in any prison under sentence of death is a competent witness in any court of criminal jurisdiction and is bound to attend upon the order of the judge.

Case stated by Metcalfe, J.

The court consisted of HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON, and HAGGART, JJ.A.

H. P. Blackwood, K.C., for Crown.

A. V. Darrach, for accused.

RICHARDS, J.A.:—The accused is charged with the crime of murder. Counsel for the Crown applied to the assize judge, Mr. Justice Metcalfe, for an order, under sec. 977 of the Criminal Code, to enable him to call, as a witness for the prosecution, one Prokofy Malkoff, who had previously been convicted of murder and sentenced to death, and who is now held as required by sec. 1064 of the Code, awaiting the carrying out of that sentence.

To get the opinion of this court, as to whether he had power to grant the order, the learned trial judge refused the application, but, at once stated a case, asking the following questions:

"(1) Was I right in refusing the application?

"(2) Should I have ordered Malkoff to be produced as a witness?

"(3) Have I jurisdiction to compel his attendance?

"(4) Is Malkoff (a person under sentence of death) a competent witness?"

Three cases were cited to this court on the argument. In the Queen v. Webb, 11 Cox C. C. 133, Lush, J., in 1867, held

that a person under sentence of death was attainted and civilly dead, and refused to allow him to be called as a witness.

In Graeme v. Globe Printing Co., 10 C. L. T. 367, the Master in Chambers, at Osgoode Hall, held, following Reg. v. Webb, that a person under sentence of death was not a competent witness. In a note to that case it is stated that, in 1865, Byles, J., admitted the evidence of a person under sentence of death.

In the King v. Hatch, 16 Can. C. C. 196, McLeod, J., held that such a person was a competent witness.

Formerly a person under sentence of death was not a competent witness. The conviction and sentence caused him to be attaint, and the attainder destroyed his competency.

In Comyn's Digest, Vol. 7, p. 447, it says: "So a person attainted or convicted of treason or felony shall not be a witness."

Viner's Abridgement, Vol. 12, says, at p. 27: "Persons that have been attainted of felony, though pardoned shall not be of a jury or witnesses." And see R. v. Castlemaine, Raymond 379; Collier's Case, Raymond 369, and Brown v. Crashaw, Bulstrode, 154.

It was not the sentence but the attainder that destroyed the competency.

In 1867, when Lush, J., ruled as above in The Queen v. Webb, it was doubtful whether the disability, imposed by the attainder resulting from the sentence of death, had been removed by statute 6 & 7 Vict. ch. 85, sec. 1. But in 1870, there was passed in England the Act, 33 & 34 Vict. ch. 23, the first section of which says:—

"No confession, verdict, inquest, or judgment of or for any treason or felony or felo de se shall cause any attainder."

It seems to me that, by enacting that the verdict, or judgment, should not cause an attainder, the above removed all difficulty in the way of calling, as a witness, a person under sentence of death, or under any other sentence, as it prevented the following, from the conviction, of those consequences which destroyed the competency.

Substituting "indictable offence" for "felony" sec. 1033 of our Code uses exactly the same language as that last above quoted.

Sec. 977 of our Code provides that, "when the attendance of any person confined in any prison in Canada . . . is required in any court of criminal jurisdiction in any case

cognizable therein by indictment, the court or judge may make an order upon the warden, or gaoler, or upon the sheriff or other person having custody of the prisoner . . . to himself convey such prisoner to such place."

The section places no limit on the words "any person confined in any prison," and there is nothing in it that puts a person, confined under a death sentence, in a different position from that of any other person confined in prison. Unless restricted by some other provision of the Code it clearly gives power to the judge to cause a person under sentence of death to be brought to court as a witness. But it is suggested that sec. 1064 does interfere by preventing the removal of the person so under sentence from the place where he is held awaiting execution. It says:

"Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except the gaoler and his servants, the medical officer or surgeon of the prison and a chaplain or a minister of religion, shall have access to any such convict, without permission, in writing, of the court or judge before whom such convict has been tried, or of the sheriff."

I think that the above does not interfere with the exercise of the powers given by sec. 977. The two actions must be read together, so as to give effect to both. It seems to me that, so doing, I should hold that sec. 1064 is directory and enacted for the purpose of safely keeping the person so under death sentence until the sentence is carried out, and that it must be subject to sec. 977.

I would answer the first question asked by the learned trial judge in the negative, and the second, third and fourth questions in the affirmative.

CAMERON, J.A.:—At the trial of this case the Crown proposed to call as a witness one Prokofy Malkoff, a prisoner in the gaol of the Eastern Judicial District, who had been convicted of murder and sentenced to death. The application was refused by Mr. Justice Metcalfe, the trial judge, who reserved a case on the points involved, submitting the following questions for the opinion of this court:

"(1) Was I right in refusing the application?

"(2) Should I have ordered Malkoff to be produced as a witness?

"(3) Have I jurisdiction to compel his attendance?

"(4) Is Malkoff (a person now under sentence of death) a competent witness?"

The incompetency of a person who has been convicted of a crime to give evidence was early established in England. The origin and history of the law are set out in Wigmore on Evidence, secs. 519-524. The ground of the exclusion was that "the man who has been guilty of a heinous crime cannot be trusted in any respect, therefore cannot be trusted in his testimony." In 1724 Chief Baron Gilbert, Evidence 139, said: "The second sort of persons excluded from testimony for want of integrity are such as are stigmatized. Now there are several crimes that so blemish that the party is ever afterwards unfit to be a witness." Ibid. 519. According to Greenleaf on Evidence, 1842, sec. 373, the enumeration of these crimes thus rendering the perpetrator infamous is difficult. "The usual and more general enumeration is treason, felony and the crimen falsi." All treasons and almost all felonies were punishable with death. But the extent and meaning of the term crimen falsi, borrowed from the Roman Law, is nowhere laid down with precision. Wigmore, Evidence, sec. 520. It is clear also that it was the judgment and not the guilt that thus rendered the person infamous in law. Ibid. sec. 521. But the Legislatures of nearly every jurisdiction have long since either entirely abolished or narrowly restricted the disqualification by conviction of crime. The earliest statute seems to have been that of England in 1843 (Lord Denman's Act, 6 & 7 Vic., ch. 85, sec. 1). Wigmore, 524.

This disqualification seems to have been regarded as one of the incidents of attainder. "When it was clear beyond all dispute that the criminal was no longer fit to live he was called attaint and could not, before the Evidence Act, 1843, be a witness in any court . . . The consequences of attainder were (1) forfeiture, (2) corruption of blood." (Encyc. Brit. Article, Attainder).

The section of Lord Denman's Act referred to enacted that "no person hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence . . . : but that every person so offered may and shall be admitted to give evidence . . . notwithstanding such person offered as a witness may have been previously convicted of any crime or offence." In a note to this section it is stated in Taylor on

Evidence, sec. 1347, "Lush, J., is reported to have ruled that, notwithstanding these words, a person under sentence of death is incapable of being a witness, R. v. Webb, 1867, 11 Cox C. C. 133. Sed. qu. In R. v. Fitzgerald, 1884, unreported, the evidence of a convict was admitted and R. v. Webb not followed (Harrison, J.). In that case Lush, J., said, 'A person under sentence of death stood in a different position from an ordinary felon. Under the old law a person attainted and sentenced to death was deemed civilly dead, and he did not think his capacity as a witness was restored by the 6 & 7 Vic., ch. 85, sec. 1, and he could not therefore receive his evidence.'" Apparently, therefore, the ground taken by Lush, J., was not that the disqualification by crime was not removed by the statute, but that the disqualification still subsisted as an incident of the civil death of the person sentenced to death. As noted the judgment of Lush, J., was given in 1867. In 1870 the Forfeiture Act, ch. 23, 33 & 34 Vic. was passed, by which it was enacted in sec. 1, "From and after the passage of this Act, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or felo de se shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in this Act shall affect the law of forfeiture upon outlawry." This is identical in terms with sec. 1033 of our Criminal Code, with the exception of the proviso, and with the substitution of "indictable offence" for "felony."

Sec. 1 of the Canada Evidence Act, R. S. C. 1906, ch. 145, enacts: "A person shall not be incompetent to give evidence by reason of interest or crime."

Apart from the effect of the Act of 1870 the text-writers regard with disapproval the decision of Lush, J., in R. v. Webb; Taylor, Evidence, supra; Roscoe, Criminal Evidence, 104. Archbold, Criminal Pleading, at p. 455, says of it: "But this decision was prior to the Forfeiture Act, 1870 (33 & 34 Vic. ch. 23), and seems to be inconsistent with the provisions of that Act."

In Graeme v. Globe Printing Co., 10 C. L. T. 367, an order to examine a prisoner sentenced to death was refused. Reference is there made to Regina v. Gregoris Mogni, reported in the London Times, March 3, 1865, where Byles, J., admitted the evidence of a prisoner under sentence of death. In R. v. Hatch, 16 Can. Cr. Cas. 196, McLeod, J., of the

Supreme Court of New Brunswick, held that a prisoner under sentence of death was a competent witness.

It, therefore, seems clear that neither on the ground of the civil death of a proposed witness who is a prisoner under sentence of death nor on the ground of his conviction of crime can the competency of such witness be questioned.

The other question to be determined arises from the apparent conflict between two sections of the Code.

Sec. 977 of the Code provides:

"When the attendance of any person confined in any prison in Canada, or upon the limits of any gaol, is required in any court of criminal jurisdiction in any case cognizable therein by indictment, the court before whom such prisoner is required to attend, or any judge of such court or of any superior court or any county court, or any Chairman of General Sessions, may, before or during any such term or sittings at which the attendance of such person is required, make an order upon the warden or gaoler of the prison, or upon the sheriff or other person having the custody of such prisoner,—

(a) to deliver such prisoner to the person named in such order to receive him; or,

(b) to himself convey such prisoner to such place.

"2. The warden, gaoler or other person aforesaid, having the custody of such prisoner, when so required by order as aforesaid, upon being paid his reasonable charges in that behalf, or the person to whom such prisoner is required to be delivered as aforesaid, shall, according to the exigency of the order, convey the prisoner to the place at which he is required to attend and there produce him, and then to receive and obey such further order as to the said court seems meet."

Sec. 1064 of the Code further provides:

"Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except the gaoler and his servants, the medical officer or surgeon of the prison and a chaplain or a minister of religion, shall have access to any such convict, without permission, in writing, of the court or judge before whom such convict has been tried, or of the sheriff."

The object of the later section is obviously to provide for the safe custody of the prisoner while under sentence of death to prevent attempts to escape suffering the penalty of the law.

It is surely in accordance with the due administration of justice that sec. 1064 should be read subject to the provisions of sec. 977. The value of the evidence lies wholly within the competence of the jury. It might be of vital importance either for the Crown or for the defence, and it should not be excluded on account of the directory character of the provisions of sec. 1064, the object of which is perfectly plain.

In the result the answer to the first question must be given in the negative, and the remaining three questions in the affirmative.

HOWELL, C.J.M., PERDUE and HAGGART, JJ.A., concurred.

MANITOBA.

MARCH 12TH, 1915.

COURT OF APPEAL.

RE DART, DRURY AND MADDOCK.

Trusts and Trustees—Remuneration—Trustee Act (R. S. M. 1913, ch. 200), sec. 49—Partnership—Payment for Services of Partner—Absence of Express or Implied Agreement—Partnership Act (R. S. M. 1913, ch. 151), sec. 27 (f).

A, the owner of certain land, agreed to sell it to himself, B, and C. A was to retain the registered title of the land which was to be subdivided and sold by C who was to collect and pay over to A the purchaser money out of which A was to pay C certain specified percentages for making the sales and collections. The money realized by the sales was to be first applied in payment to A of the original purchase-price and the remainder was to be equally divided between A, B, and C:—

Held, that there was a partnership with respect to the said land; that, therefore, in the absence of express or implied agreement to the contrary, A was, as a partner, entitled to no remuneration for his services.

Manitoba Mortgage Co. v. *Bank of Montreal*, 17 S. C. R. 692, followed.

An appeal from the judgment of GALT, J., dismissing the petition of James Alexander Dart asking to be allowed remuneration under sec. 49 of the Trustee Act.

The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

C. P. Wilson, K.C., and W. C. Hamilton, for appellant.

A. E. Hoskin, K.C., for respondent.

RICHARDS, J.A.:—Mr. Dart, in March, 1906, by contract in writing, sold lands, owned by himself, to himself and Messrs. Drury and Maddock for $60,000, of which only $5,000 was paid at the time of sale.

The land was to be subdivided and sold by Maddock. Dart was to retain the registered title and to carry out, and receive the proceeds of the sales, and Maddock was to collect and pay over to Dart the purchase money on such sales.

Out of the money so received Dart was to pay Maddock certain specified percentages for making the sales and collections.

The balance of these moneys, after paying some disbursements, was to be paid over to the three purchasers in equal shares. But the purchasers, again, were to pay Dart the postponed payments of the $60,000 purchase money, with interest, so that, in effect, the moneys so realized by the sales were to be first applied in payment of the balance of the original purchase money.

The above is the effect of the written agreement entered into between the parties, and practically carried out by them. That writing expressly provides for the payment to Maddock of the above percentages, but makes no provision for any remuneration for Dart's services.

In October, 1913, Dart presented a petition to the Court of King's Bench, asking to be allowed remuneration for his care, pains, trouble and time expended in and about the trusts of carrying out his part of the agreement.

The petition was dismissed by Mr. Justice Galt and Mr. Dart has appealed to this court.

The respondents claim that the petitioner is not entitled for three reasons:

1st. That, as they assert, he retained the title and performed the services in question solely for his own protection.

2nd. That, as they assert, it was agreed, when entering into the contract in question, that he was not to be paid for such services.

3rd. That the contract created a partnership as to the land and the proposed dealings with it, and that, therefore,

in the absence of an express, or implied, agreement that he should be paid, Mr. Dart was, as a partner, entitled to no pay for his services.

The sales of lots apparently realized between $145,000 and $150,000. Of this $55,000 with interest really went to the petitioner, to pay for the land. Then, he was entitled to a third of the balance. So that he was personally interested to the extent of nearly two-thirds of all the moneys realized.

He made no bargain for remuneration. It is apparent that, when the contract was made, he did not know of the statutory provision for payment of trustees.

About three months after making the contract he was made a trustee for himself and others (not including Drury or Maddock) in regard to another property to be put on the market. In that case he bargained for pay for his services.

In November, 1907, he and Drury and Maddock made a supplementary contract in writing, affecting the property now in question and other properties, for which parts of it had been exchanged, and in making it, he set up no claim for remuneration.

Both Drury and Maddock swear that it was part of the real consideration for their entering into the contract to buy at the $60,000, that Dart should act as trustee. He nowhere denies this statement, as far as I can see.

They say that he insisted on holding the title in his own name for his own protection. I do not find that he specifically denies that. He says that Maddock suggested his acting as trustee. But he does not suggest that he otherwise would not have so acted.

The work he did in checking over the accounts with the different purchasers and in executing agreements of sale and transfers would have had to be done by him to at least the same extent if the title had been vested in himself, Drury and Maddock instead of in himself alone.

It was most natural, in view of his preponderating interest, that he should wish to hold the title. In fact, until he should be paid the $55,000 and interest, such a course was reasonably essential to his own protection in the matter.

It may here be mentioned, too, that he was further protected by a condition in the agreement, that enabled him to forfeit the share of either of the other parties, on the happening of certain defaults in meeting their shares of the periodical payments to him on the purchase price.

Drury and Maddock say that it was never contemplated, or agreed, that Dart should receive remuneration, and he does not deny that. Drury swears he would not have gone into the transaction if he had known that Dart meant to charge.

It was not until a comparatively short time before presenting the petition that Dart made any claim. He then told Maddock of his intention, but he appears to have never told Drury.

On a careful consideration of the evidence, I think it appears that Dart performed his services and held the title mainly, if not solely, for his own protection.

I further think it was implied, and fully understood, that he was to give his services without charge. He knew nothing of any statute providing for payment of trustees, and he knew that, on the face of the agreement, provision was being made to pay Maddock, while nothing was said as to his being paid.

I do not think that sec. 49 of the Manitoba Trustee Act, even was intended to mean that a trustee should be paid in a case where he became such for his own purposes, or in a case where it was understood that he was not to be paid.

In Manitoba Mortgage Company v. Bank of Montreal, 17 S. C. R. 692, three persons had bought land together and had subdivided it into town lots and sold them. It was held by the Supreme Court that their so doing created a partnership in the matter.

I am unable to distinguish that case from the present one on that point. The fact that there the title was vested in all three of them, while here it remained in one, is immaterial. That case seems to me an authority for the holding that, in this case, there was, as to the dealings with the land, a partnership between Dart, Drury and Maddock.

Sec. 27 of the Partnership Act provides that the interests of partners in the partnership property, and their rights and duties in relation to the partnership, shall be determined, subject to any agreement, express or implied, between the partners, by certain rules, one of which says: "(f) No partner shall be entitled to remuneration for acting in the partnership business."

If I am right (following Manitoba Mortgage Co. v. Bank of Montreal, cited above) in holding that the dealings in question constituted a partnership, then Mr. Dart has no

claim to the remuneration he asks for. The above section and subsection (f) distinctly say he has not, unless under some agreement, express or implied. The contract shews there was not an express one, and the evidence shews that none was implied.

I express no opinion that a partner can not, in addition to his share under the partnership agreement, express or implied, claim remuneration under any rule of equity, or common law, applicable to partnership, and not inconsistent with the Partnership Act. Such rights, if any, are, perhaps, retained by sec. 3 of that Act. I do not, however, see that any such situation arises here, even if it could be dealt with under the petition now before us, which I doubt.

I would dismiss the appeal with costs.

PERDUE, J.A.:—The appellant, Dart, claims that he acted as a trustee for himself, Maddock and Drury in taking charge of and administering certain property and funds, and that consequently he is entitled to compensation under the Trustee Act, R. S. M. 1913, ch. 200, secs. 48-51. Dart had acquired certain lands near Winnipeg, part of which consisted of town lots, the remainder being one hundred and sixty acres of unsubdivided land. An agreement was entered into by Dart with Drury and Maddock on 1st March, 1906, whereby he agreed to sell to each of them an undivided one-third interest in the above-mentioned real estate. The agreement was prepared by one of the parties and, although it is unskilfully drawn and in parts not very clearly expressed, there is no dispute between the parties as to the meaning to be placed upon it. The land was taken at a valuation of $60,000. Drury and Maddock each agreed to pay Dart $20,000 by instalments for an undivided one-third interest, Dart to furnish a clear title and to hold the interest of the other parties in trust for them. The main object of the agreement was to subdivide the land into town lots and sell them at a profit, the profits to be divided between the three parties.

It was agreed that Maddock, who appears to have had skill and experience in business of this nature, should have the land surveyed into lots as he deemed advisable, that the plans should be registered, and that he should make the sales. For doing this work Maddock was to receive a commission and was also to be paid his outlay for taxes and other

expenses. Dart agreed to convey the lots sold to purchasers on Maddock's request, and on receiving payment of a certain proportion of the purchase money. All moneys received on account of sales were to be paid to Dart and deposited by him in a special account. These moneys, after paying the commission and expenses were to be divided equally between the parties. Apparently, the intention of the agreement was that Maddock and Drury should pay the instalments of purchase money due from them to Dart from their shares of the moneys coming to them on each monthly division. This was the practice adopted.

The land was subdivided into lots, placed on the market and the first sale made in April, 1906. Dart signed the agreements of sale to purchasers and Maddock paid to Dart the money collected. By reason of purchasers making default under their agreements many cancellations took place and the lots had to be re-sold. Parts of the property were exchanged for other lands which had to be disposed of. A great burden of responsibility was, no doubt, thrown upon Dart who had to inquire into and assume the validity of the cancellations. He had also to ascertain the correctness of the account with each purchaser before executing and delivering the conveyance. He had also the duty of taking charge of and administering the moneys received. There is no doubt that Dart assumed a position of responsibility and of some difficulty extending over a number of years. All this is strongly urged as entitling him to remuneration as a trustee.

The agreement shews that the persons who were parties to it acquired the land in common with the intention of dividing it into lots and selling them with a view to profit. There was therefore a partnership between them as to this particular business or adventure. That this was the relationship between the parties appears to me to have been settled by the decision in Manitoba Mortgage Co. v. Bank of Montreal, 17 S. C. R. 692. In that case three persons had engaged in joint speculations in the purchase and sale of lands. It was held that a partnership in respect of that business existed between them. In the judgment of Patterson, J., with whom the other members of the court agreed, the following passage from Lindley on Partnership was cited with approval:

"If persons who are not partners in other business share the profits and loss, or the profits, of one particular transac-

tion or adventure, they become partners as to that transaction or adventure, but not as to anything else." Lindley on Part., 5th ed., p. 49, 7th ed., p. 67. I would also refer to the definition of partnership in sec. 4 of the Partnership Act, R. S. M. 1913, ch. 151, and to the rules for ascertaining the existence of a partnership contained in sec. 5.

The general rule is that if a partnership exists between persons, none of them is entitled to remuneration for acting in the partnership business unless there was an agreement express or implied allowing such remuneration: Partnership Act, sec. 27 (f). In the present case there is no provision in the agreement giving Dart remuneration for the services which he undertook to perform. There is at the same time a very complete provision as to the commission to be paid to Maddock for his services and as to the payment of other necessary expenses. If it had been contemplated that Dart was to receive remuneration, it would surely, one would think, have been mentioned in the written agreement when the question of paying commission to Maddock and the payment of other outgoings were under consideration. So far from shewing that there was any implied agreement as to paying remuneration to Dart, the evidence expressly excluded it. In his affidavit filed in support of his petition he does not even suggest that there was any agreement or understanding that he was to receive pay for his services. Both Drury and Maddock positively assert that there was no such agreement. They assert that Dart insisted upon holding the title to the property in his own name in order that he might be secure as to his purchase money.

In a subsequent agreement made between the same parties on 11th November, 1907, relating to certain lands received in exchange, the agreement of 1st March, 1906, is referred to as a "declaration of trust." The purpose of the later agreement was to place the lands received in exchange in Dart's hands, under the same trust as that under which he held the lands mentioned in the first agreement. The earlier agreement did contain a declaration of trust on the part of Dart, but this was a mere incident of the main agreement, which was one creating a partnership in the transactions relating to the lands.

I do not think that the appellant has established a status of trusteeship entitling him to remuneration under the provisions of the Trustee Act. I would simply decide that he

has failed to bring himself within the purview of the Trustee Act, and would express no opinion as to whether he might or might not be able in some form of action to shew that he was entitled to an allowance for services performed exclusively by him which should have been performed by his other partners or by one of them or in which he should have received their assistance.

I think the order of Galt, J., should be affirmed and the appeal dismissed with costs.

HAGGART, J.A. (dissenting):—James Alexander Dart in a petition to the Court of King's Bench, alleges an agreement between himself and two others, Edmond Drury and Vincent C. Maddock, which he claims imposed upon him a trust which he duly administered, involving care, attention and trouble, and in which administration as trustee he received and distributed between $145,000 and $150,000, and he asks that a reasonable allowance may be made him for the work done.

The judge who heard the petition dismissed it with costs and refused Dart any remuneration, and this is an appeal by Dart from that order.

The agreement above referred to was made on the 1st of March, 1906, between Dart of the first part, Drury of the second part, and Maddock of the third part. The agreement recited that Dart was the purchaser of two parcels of land each containing about 160 acres both in the neighbourhood of Winnipeg; that $4,500 was still owing upon the said land; that Dart should pay off this balance and interest and arrears of taxes and have the title vested in himself. And it is then stipulated as follows:

"It is hereby agreed by all of the parties hereto of this agreement that they are to purchase as tenants in common, each to have an undivided one-third interest in all the above described lands and in pursuance of the said agreement the said Dart agrees to hold in trust for the said Drury and said Maddock on behalf of each of them their share as above-mentioned."

The purchase price was to be $60,000; $20,000 of which was to be paid within eight months and the balance in three equal annual instalments, and all parties agreed to meet their share of these obligations.

Maddock, who was a real estate agent in Winnipeg, was to have the lands subdivided all or part as to him might seem desirable. Dart, in whom the title was vested, was to convey to purchasers any of the lots that Maddock might request, on the basis of a payment of $250 per acre. The moneys were to be applied as set out in said agreement. Maddock was to have charge of the selling of the lots and fixing of the terms and for these services was to receive a commission of 7½% for selling and 2½% for collecting, and he was also to have the further right to cancel agreements for default in payment by the purchasers and to re-sell the lots.

Maddock and Drury covenanted to pay each one-third of the sums payable, and Dart agreed to pay one-third of the expenses incidental to the selling and management and after providing for several other details which do not affect the question before us, the agreement has a clause in these words:

"It is further agreed between the parties hereto of this agreement that all moneys received by sale of any of the said lands shall be deposited in a special trust account in the Traders Bank of Canada in the name of J. A. Dart, and shall be disbursed on the first day of each month on the following basis: First, the commission and expenses incidental to the sale of said lands shall be paid to the said Maddock hereto, and all the remaining sums shall be divided pro rata equally among the parties hereto of this agreement, and all the parties hereto will pay to the said Dart their proportion of the purchase money as hereinbefore described."

After the parties had been operating under this agreement for about a year and a half subsequently on the 11th of November they entered into another agreement. It recited that they had on the 1st of March, 1906, entered into a certain declaration of trust whereby the said Dart had agreed to hold all of certain lands in Rosser and Kildonan (being the lands referred to in the first agreement), and have the right to have part or all of the said lands subdivided into lots and blocks and also to have the right to sell all or any part of the said lands. And further that in some cases an exchange had been made for certain house property in the city of Winnipeg and certain farm property which house and farm properties are set out in detail in the schedule attached to the said agreement and then it is expressly provided "that all of the lands mentioned in certain schedules hereto attached and marked with the letter "A" are held in trust

by the party of the first part for the parties of the first, second and third parts respectively in exactly the same proportion as they would be held under the original declaration of trust dated the first day of March, 1906, and in all other respects the parties hereto are bound to protect their interests in the same proportion as they are bound under the original declaration of trust dated the 1st day of March, 1906, and all clauses and privileges granted therein to the different parties hereto of this agreement, their heirs, executors and assigns."

Dart claims that for over seven years he has been engaged in the administration of the trust set forth in these agreements, and for the first five years he personally attended daily at the office of Maddock to receive reports of sales and payments of moneys and inspect accounts; and after the expiration of five years, he attended once a week for this same purpose. Dart also claims that these services necessitated the keeping of accounts in detail and the execution of hundreds of agreements and transfers of the lots where the agreements were carried out and cancellations where the purchasers were in default, and he produces his bank books and cheques in connection with the business extending over these years, shewing that over 500 cheques had been issued at different times.

Maddock and Drury deny that there was a trust set forth in these agreements under which Dart could make any claim, and contend that the transaction in question was really a partnership, each of the partners contributing one-third of the purchase money and each becoming entitled to one-third of the net proceeds after paying the expenses and commissions referred to in the agreement.

The different text-writers give each their own definition of a partnership, the same in substance, but in different terms.

Lindley defines it as "The relation which subsists between persons carrying on a business in common with a view to profit."

Pollock says, "Partnership is the relationship which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them."

Our own Partnership Act, ch. 151, R. S. M. 1913, sec. 4, gives a definition of partnership in these words:—

"Partnership is the relation which subsists between persons carrying on a business in common, with a view of profit; but the relationship between members of any incorporated company or association is not a partnership within the meaning of this Act."

And in the following section it is enacted that, in determining whether a partnership does or does not exist, regard shall be had to certain rules, of which the following are some:

"Joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof."

"The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are derived."

"The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business; but the receipt of such a share, or of a payment contingent on or varying with the profits of the business does not of itself make him a partner in the business . . ."

I do not think the transaction in question was a partnership business. It was a single business venture and the written agreements assigned to the respective parties their duties and their obligations and also provided in certain cases remuneration for the performance of some of those duties. It provided for the payment to Maddock of his expenses and of 10 per cent. of the amount of the sales, and imposed on Dart the care and custody of the property and the money and the making of the agreements and conveyances, but provides no remuneration for him.

From a perusal of the documents in question I think that an express trust in writing was created and that Dart accepted the burden of that trust.

Maddock and Drury contend that it was not in the contemplation of any of the parties that there should be any remuneration to Dart for his services and that the agreement being silent upon this point Dart has no claim.

Under the common law a trustee could not get any remuneration unless such were provided in the document under which the trust was created and accepted or provided in

the order of the court conferring the trusteeship. Lewin on Trusts, at p. 306, says: "A trustee shall not make a profit of his office." "It has always been a general established rule to keep trustees in the straight line of their duty that they shall not derive any personal advantage from the administration of trust property." "The trustee may at the time of accepting the trust contract for an allowance or remuneration for his services." Lewin on Trusts, 784; Re Sherwood 3 Beav. 338; Douglas v. Archbutt, 2 De G. & J. 148. But bargains of this kind are watched by the court with exceeding jealousy and must be freely made and not submitted to from pressure.

"Where the settler has directed a remuneration to the trustee but has not declared the amount a reference shall be directed to settle the quantum meruit according to the circumstances of the case:" Ellison v. Avery, 1 Ves. 111.

It was also contended that Dart occupied the dual position of vendor and purchaser and also of trustee and beneficiary and that as such he could not claim remuneration. The law as to appointing one of the beneficiaries a trustee is found in Lewin, p. 41: "Cestuis que trust are not as such incapacitated from being trustees for themselves and others, but as a general rule they are not altogether fit persons for the office in consequence of the probability of a conflict between their interest and their duty:" See also Forster v. Abraham, 17 L. R. Eq. 351. The text-writer, however, goes on to say: "However, there is no positive legal objection to appointing either a cestui que trust or a relative, and indeed it is not always easy to find a trustee who is neither a cestui que trust or a relative and this the court as itself experienced, for, notwithstanding its repugnance to such a course, it has been obliged occasionally to appoint a relative who is also a cestui que trust to be a trustee." See also Ex parte Clutton, 17 Jur. 988.

Parliament, however, seems to be departing from that old rigid rule, and to recognize the fact that a trustee faithfully executing the trust he accepted ought to receive some remuneration from the beneficiaries who have received the benefit of his services. Our own statute, ch. 200, sec. 48, R. S. M. and the following sections, provide for the remuneration of trustees. Sec. 48 defines the term "trustee" and says it shall include any trustee under a deed, settlement or will . . . howsoever the trust is created. Sec. 49 is in three words:

"A trustee shall be entitled to such fair and reasonable allowance for his care, pains and trouble and his time expended in and about the trust estate as may be allowed by the Court of King's Bench or any judge or master thereof to whom the matter may be referred."

The words of the section are clear and establish the relationship between the trustee and beneficiaries as to payment for services. We would have to read the agreement between the parties as if it contained such a stipulation, and one of the authorities above cited shews that when there is such a stipulation, but the amount is not defined or agreed upon, then there may be a reference to the Master to fix the amount.

Again, such being the law, if Maddock and Drury desired to protect themselves against paying for trustee's services they should have so provided in that agreement that there should be no fees because under the statute the trustee had a right to payment. And, as to the intention of the parties, I think they are all bound by the terms of that agreement, which are clear and explicit and which was drawn or dictated by Maddock in the presence of all parties. In ascertaining the intention of the parties I have drawn my conclusions from the reading of the formal documents drawn and executed by them at the inception of the transaction and not from their affidavits filed on this proceeding.

The province of Ontario has a statute similar to our own and the effect of it was considered in Deedes v. Graham, 20 Gr., where Spragge, C., says, at p. 265: "I thought then, and I still think, that the reasons in favor of allowing compensation to trustees, whether trustees in the strict and proper sense of the term, or others virtually invested with a fiduciary character, as executors and administrators, are sounder and stronger than the reasons against it. I do not, however, go upon the cogency of the reasons one way or the other, but upon this, that the Legislature has pronounced upon the principle involved in the question; and by directing that a fair and reasonable allowance shall be made to executors, trustees, and administrators acting under wills or letters of administration, for care, pains, trouble, and time expended, has effected a change in the policy of the law, in regard to compensation to express trustees generally."

And, considering a similar question in Re The Commissioners of the Coburg Town Trust, 22 Gr., Proudfoot, V.C.,

at 381, says: "Under the statute I think I have power to fix the remuneration, or refer it to the Master to do so."

This was also followed in a later case, namely, Re Toronto Harbour Commission, 28 Gr. at p. 198, where Chancellor Spragge held that it was the duty to fix such a sum as would be a reasonable compensation for services rendered, and at the same time such a moderate sum as would not be an inducement to members of the City Council or Board of Trade or others to seeks the office for the sake of emolument."

I recognize all that has been said by Maddock and Drury as to the value of Dart's services and as to the work that he was doing being in a large measure in his own interest, but this is not in my opinion an answer to the prayer of the petition, although they are matters to be taken seriously into consideration in fixing the amount either by the Master, to whom it may be referred, or by this court.

I would hold that a trust was imposed on Dart and accepted by him, and that he executed it, and that he is entitled to some remuneration for the work he did from the parties beneficially interested, to which sum he himself would of course have to contribute one-third of the amount.

I would allow the appeal.

HOWELL, C.J.M., and CAMERON, J.A., concurred with RICHARDS and PERDUE, JJ.A.

Appeal dismissed; HAGGART, J.A., *dissenting*.

MANITOBA.

TRIAL.

METCALFE, J. MARCH 3RD, 1915.

NELSON v. BAIRD & BOTTERELL.

Brokers—Breach of Contract with Client—Wrongful Closing Out—Refusal to Carry Trades—Damages—Principle of Assessment—Winnipeg Grain Exchange.

In assessing damages against a member of the Winnipeg Grain Exchange for wrongfully closing out the account of a customer, a judge is not bound to take the highest peak as the measure thereof but may base his assessment upon the principle adopted by juries.

W. H. Trueman, for plaintiff.

A. E. Hoskin, K.C., and P. J. Montague, for defendants.

METCALFE, J.:—The plaintiff resides at Netherhill in the province of Saskatchewan. He is a farmer and cattle dealer. The defendants are brokers operating on the Winnipeg Grain Exchange.

Prior to the transactions over which this dispute arose the plaintiff had, through other brokers, some experience in dealing in "futures" on the Winnipeg Grain Exchange. The plaintiff had also several prior dealings with the defendants as follows:—

June 11/14	Bought 5,000 July Oats	39½
June 23/14	Sold 5,000 July Oats	39¼
July 22/14	Bought 1,000 October Flax	155½
July 27/14	Bought 1,000 October Flax	174½
July 29/14	Sold 2,000 October Flax	164¼

It was intended that these transactions should be carried out on the Winnipeg Grain Exchange. In each transaction with the defendants there was sent to the plaintiff either a bought or sold note, as the case required, containing the following provisions:—

"We have made the following transactions for your account and risk under the by-laws, rules, regulations and customs of the Winnipeg Grain Exchange of the City of Winnipeg, upon the distinct understanding and agreement between us that the actual receipt or delivery of the property and payment therefor is contemplated and intended and in the meantime until such receipt or delivery and payment thereof, we reserve the right, in case at any time margins are running out or approaching exhaustion, to close the trades by purchase or sale upon the said Grain Exchange of the city of Winnipeg without calling for additional margins or the giving of further notice."

In the transactions with other brokers similar notes were used.

The negotiations in each case had been carried on through one Myers, a grain agent residing at Netherhill, who, in each case, wired the brokers to buy. The brokers, being furnished with margin, bought, and sent the bought notes.

The terms of the contract must be gathered from the bald instructions to buy and sell; from the acceptance of the employment and these bought and sold notes: and from the surrounding circumstances.

The dealings bear the ear-marks of contracts in "futures" with an intention to settle on differences.

On July 30th, 1914, Myers wired the defendants to buy 3,000 bushels of October flax for the account of the plaintiff at a price under 162. Myers at that time knew that large margins were required by the brokers. On the same day one Kierstead wired the defendants to place $1,100 to the credit of the plaintiff. The flax was bought at 158 and on the morning of July 31st, the money was carried to Nelson's credit in the defendants' books.

Early on the 3rd of August Nelson wired the defendants to buy 2,000 October wheat. This was bought by the defendants for the account of Nelson at the opening price of 95½.

It was intended by the plaintiff that both these purchases should be made on the Winnipeg Grain Exchange on margin. I find that the plaintiff was aware that the margin then required by the defendants for like transactions was 20 cents a bushel on flax and 10 cents a bushel on wheat "to be kept good."

The wheat and flax were purchased in the pit of the Winnipeg Grain Exchange by the defendants for the plaintiff for October delivery. Such transactions are daily recorded in the clearing house, and each transaction has to be supported by a margin placed with the clearing house by the broker. At that time the clearing house required from the broker a margin of 20 cents a bushel on flax and 10 cents a bushel on wheat "to be kept good." Afterwards, throughout each day's proceedings, whenever the prices dropped 2 cents, the clearing house calls the broker for a further margin. The broker has 15 minutes within which to settle, and so on each further drop of 2 cents at all times daily until the closing of the exchange, and so on from day to day.

About this time matters were very unsettled in Europe. The brokers were nervous and apprehensive.

On the morning of August 3rd, war was declared. Flax opened at 149, or 9 cents below the purchase. It fell suddenly to 136. Mr. Botterell says he then gave the order to his floor man to sell the wheat bought that morning and the flax; that the wheat, being saleable, sold first, but that, although they offered the flax all the way down to 129½, there were few sales, and he was unable to sell; that at this time the brokers offering flax all stepped out of the pit, refusing

to slaughter it further; that flax then became a little firmer; that he took the first offer he could get and sold this flax 2,000 bushels at 133 and 1,000 bushels at 134.

Except some telegrams to Myers, which are not brought directly home to the plaintiff, there was no notice of further calls.

The defendants seek to justify the absence of notice by setting up the terms of the bought and sold notes, and the extraordinary occasion.

On the morning of August 3rd, the plaintiff had in the defendants' hands available for margin:—

Transferred from Kierstead's account, ...	$1,100
Money on hand from past settlements, ...	63
	$1,163

The defendants decided to close out these deals when flax reached 136. At that time, had an account been struck, it would (excluding all brokerage charges) stand about as follows:—

	Dr.	Cr.
By cash on hand		$1,163
To margin on 3,000 flax at 20	600	
To margin on 2,000 wheat at 10	200	
To 3,000 flax at 158	4,740	
By 3,000 flax at 136		4,080
To 2,000 wheat at 95½	1,910	
By 2,000 wheat at 95½		1,910
Short on margins		297
	$7,450	$7,450

The standing required margins being $800, his equity at that time was $503, less brokerage. Unless in the meantime the defendants should have credited the sale of the wheat in the pit, which took place a few moments prior, when flax fell to 129½, this equity would have fallen to $388, less brokerage.

Nelson admits that he knew Myers had received a wire from the defendants that all the Netherhill clients had been sold out. He came to Winnipeg on the 7th of August and went to the defendants' office. He then saw Mr. Botterell,

and asked him if he had been sold out. Upon Mr. Botterell answering in the affirmative, he complained that he had sufficient money on hand to have carried his "trades," and insisted upon his "trades" being reinstated. Botterell refused to reinstate the "trades." Nelson then claimed that in any event there was some $400 coming to him. Botterell, I think, then took the stand, that because of the unsettled markets, Kierstead's account would not stand the transfer of $1,100, and that consequently, while their books had shewed a transfer of the money, they had transferred back to Kierstead's account the balance standing in their books to Nelson's credit on August 3rd after closing out the wheat and flax.

Nelson, being angry, left, and subsequently, on August 9th wrote to Mr. Baird of the defendant firm a letter as follows: "Dear Sir: I am addressing this letter to you personally in order to get a personal explanation of the treatment I have rec'd from the firm of Baird & Botterell.

"On July 30th, 1914, I had placed to my credit on your Option Ledger, $1,100.00. I had no open trades prior to that day, but had a small amt. to my credit before that. On July 30, I wired to buy 3000 Oct. Flax and rec'd a wire the same date that your firm had bought 300 Oct. Flax at 158. On Aug. 3, I wired to buy 2000 Oct. wheat under 98c. I rec'd no reply to this wire. I have been away from Netherhill since the 3rd, but yesterday rec'd a letter from your firm stating that on Aug. 3rd you had sold for my acct. 2000 Oct. Flax at 133 and 1000 at 134, also that you had bought 2000 Oct. wheat at 95½ and sold same at 95⅛. Now I want to know on what ground this Flax was sold and why the purchase of the wheat was not wired me. I knew that I had margins enough to cover my Flax trade. I do not intend to stand for such treatment as this, and shall expect you to place the 3000 bu. of Oct. Flax back to me at the price you sold it at and hold it for me until I order it sold. Hoping you will attend to this matter at once, I am, Yours truly, (Sgd.) E. C. Nelson."

Mr. Baird, on August 21st, responded as follows:—

"Dear Sir: Your letter of the 9th inst. was unanswered owing to my absence from the City. On July 31st Mr. Kierstead instructed us to transfer $1,100 to the credit of your account, we transferred only $700 instead of $1,100, as this was all that Mr. Kierstead's account would stand. Your

margins on Flax and Wheat were exhausted when we had the panic market, and there wasn't anything else for us to do but close out your account, which we did and reported to you in the usual way. You will appreciate that Flax sold at $1.30 per bushel on the day in question, and there wasn't any time or opportunity for us to get in touch with you to secure additional margins.

"We are very sorry that it was necessary to close you out, but we did so under the terms under which all trades are put on with us, and, therefore, are unable to reinstate your trades as requested. We believe that the above explanation will be satisfactory to you.

Yours very truly,
(Sgd.) Baird & Botterell.
per H. N. Baird."

Later, on the 22nd August, 1914, Mr. Baird wrote to Kierstead as follows:—

"Dear Sir: We hand you herewith statement of your account, and on the date of transfer from your account to that of Nelson, your equities in open commitments would only permit of our transferring $700, as the market took a very sharp break, and, therefore, the amount of $1,100, which you asked us to transfer was not transferred, as you will note per statement enclosed.

"While it is quite true you wired us to transfer the money from one account to another, yet we never accept instruction by wire to transfer money from one account to another, and it was only on receipt of your letter, dated July 30th, which was received here August 3rd, the date of the panic, and on that day the $700 was all that was permitted to be transferred.

"We have had a call from Mr. E. C. Nelson, who claims that he made settlement with you on the basis of a transfer of $1,100. While this may be absolutely correct, and we have no doubt but that it is, yet we informed him, that we had only transferred $700, and that if there was any more money coming from you to him, that he must look to you for the amount.

"During the panic there was no time to communicate with anyone in regard to additional margin, and we had to close out our friends without consideration other than our own interests, and according to the terms which commitments are

taken on by us. We, therefore, ask you to let us have a cheque for $76.25, which is the debit in your account, and oblige.

Yours very truly,
(Sgd.) Baird & Botterell,
Per H. N. Baird."

The defendants now admit that the plaintiff is entitled to $406.25, being the moneys so transferred to Kierstead's account, together with a balance of $6.25, and have paid it into court.

The following prices for October flax indicate the trend of the flax market:—

	Open.	High.	Low.	Close.
Aug. 3	149	149	129½	140
Aug. 7	145⅛	150½	145⅛	150
Aug. 11	153½	155½	152¼	152¼
Sep. 1	139	140	138	138
Sep. 4	143	143¼	142	142
Oct. 1	120½	121	119½	120
Oct. 28	106	106¾	105¾	106⅜

The following prices for October wheat indicate the trend of the wheat market:—

	Open.	High.	Low.	Close.
Aug. 3	95½	97¾	94⅝	96½
Aug. 7	106	110½	105⅜	110
Aug. 8	110	110⅛	105¼	105⅞
Aug. 17	97⅝	98	96½	98
Aug. 31	115	115½	114¾	114⅞
Sep. 4	117½	121	117½	120
Sep. 15	105½	107¾	105½	107¼
Oct. 1	107⅞	108¼	107¼	107¼
Oct. 3	104½	106	104½	105⅞
Oct. 31	...	...	...	116½

The plaintiff, while obliged to accept delivery on October 1st, could not compel delivery until the last day of October.

There were two courses open to the plaintiff. He might treat the contract as rescinded, except for the purpose of bringing an action. He might therefore:—

1. Have brought an action for the breach, or

2. Have refused to treat the contract as rescinded and insisted on his rights thereunder when the time for performance arrived.

He chose the former course and on September 4th, he commenced this action.

Regarding the flax, the plaintiff alleges, in effect, that he paid moneys to the defendants and employed them to buy the flax for 158 per bushel; that the defendants undertook and agreed with the plaintiff, in consideration of such money then paid (and such further sums as might thereafter be required for commission and other charges to protect the defendants from loss in the event of a decline in the price of said flax) that they would retain and keep the said agreement to purchase in good standing and would guarantee the delivery of the flax to the plaintiff in October on payment of the price; that in breach of the said agreement and duty the defendants closed out and cancelled the flax, causing a loss of $747.50, which the plaintiff claims.

Regarding the wheat, the plaintiff alleges a similar contract, and further alleges that at the time the wheat was purchased there was an implied contract that instead of the plaintiff taking delivery in October, the defendants would re-sell the same at any time prior to October 31st, 1914, upon being ordered by the plaintiff to re-sell the same and would account to the plaintiff for the profits of such re-sale; that in breach of the said agreement to purchase, and of such implied agreement, the defendants wrongfully closed out and cancelled said wheat contract and wrongfully sold said wheat; that wheat afterwards advanced in price; that the plaintiff could have subsequently re-sold it at a profit of $500, which sums he claims as damages.

He therefore sues for:—

Damages for loss on flax	$747 50	
Damages for loss of profit on wheat	500 00	
		$1,247 50
Moneys paid		1,100 00
		$2,347 50

These allegations, coupled with the fact that at the trial the plaintiff's counsel complained that the brokers had made no effort to protect his client by "stop orders" and the general circumstances are persuasive that the plaintiff intended contracts such as were condemned in Richardson v. Beamish, 23 M. R. 306; 49 S. C. R. 596.

For obvious reasons neither party has raised the point.

I think that the brokers, if they acted reasonably, were protected by the bought notes.

What was reasonable under the circumstances?

I have no doubt the brokers were nervous, apprehensive and excited on that day. Counsel for the plaintiff at the trial produced the sheets shewing sales, and says that they disclose no reason for panic; but these sheets, while they shew the actual sales registered, do not indicate the numerous offering bids that must have been made to force flax down to 129½, with practically no sales, nor the many incidents naturally following the news of the declaration of war. I am of the opinion that the event was extraordinary.

It is extremely different looking backward to judge what was and what was not reasonable.

I think that under the circumstances the defendants were justified in selling the flax. I do not think they should have sold the wheat.

The plaintiff's counsel urges that he should have damages at the highest peak, and relies for that proposition on Michael v. Hart, [1901] 2 K. B. 867. In that case the plaintiff in April opened an account with the defendants (stock brokers) and employed them to buy and sell shares for him, depositing with them as security certain shares. Defendants bought and sold various shares for plaintiff. On May 11th, it was agreed that certain contracts for the purchase of various stocks for stock exchange settlement of the middle of May should be carried over to the end of May settlement. Defendants contended that agreement was conditional and proceeded to sell. The jury found that the agreement was not conditional and that the sale was in breach of the agreement.

Wills, J., at 869, says: "The only matter that I have to deal with in this case is the measure of damages . . The defendants further, by their contract, undertook that they would at any time before the settling day, if directed to do so by the plaintiff, sell the same shares for the plaintiff. This they did not do, but repudiated their contract, and put an end to it. Under these circumstances it seems to me that the plaintiff is entitled to all the advantages that would have been his or that might have been his if the contract had been carried out. Amongst those advantages was the right to sell the shares whenever he chose during the period over which the transactions were to run, and at different times

different prices might have been realized. No doubt the plaintiff would in fact never have realized the best prices that ruled during that period. But I think I am right in saying that the courts have never allowed the improbability of the plaintiff's obtaining the highest prices to be taken into consideration for the purpose of reducing the damages. The defendants are wrong-doers, and every presumption is to be made against them. In my opinion the plaintiff is entitled to the highest prices which were obtainable during the period during which he had the option of selling."

In Appeal, [1902] 1 K. B. at p. 490, Collins, M.R., in delivering the judgment of the court, says: "The general rule, which is laid down with regard to such cases, is that, where there has been what has been called an anticipatory breach of contract going to the whole consideration, it has not of itself the effect of rescinding the contract, for there must be two parties to a rescission. It only has the effect of giving the other party to the contract an option to treat the repudiation of the contract as a definitive breach of it, and thereupon to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it. It gives him the right to do that; but, on the other hand, he may refuse to treat the contract as rescinded, and hold the party repudiating the contract to his obligation when the time fixed for performance arrives."

After discussing Frost v. Knight (1872), L. R. 7 Ex. 111; Roper v. Johnson, L. R. 8 C. P. 167; Brown v. Muller, (1872), L. R. 7 Ex. 319, and Johnstone v. Milling (1886), 1 Q. B. D. 460, the learned Judge, at p. 492 of the report, continues: "In the present case the action was not brought till after the time at which the contract ought to have been performed by the defendants, and the plaintiff, upon notice of the closing of his accounts, distinctly insisted on performance of the contract, and that the defendants' obligation continued up to the date of the settlement. Under these circumstances the defendants' counsel argue that the damage ought to be calculated with reference to the prices of the stocks at the time of the closing of the plaintiff's account, and that, if they are so calculated, there will be no damages, or only nominal damages, and therefore that the plaintiff can only recover nominal damages. I am of opinion that, having regard to the principles laid down by the authorities to which I have referred, the contention for the defendants on this point cannot be sustained."

"There is yet another alternative measure of damages which was adopted by the learned judge. . . . With regard to the question, which of these two alternative measures of damages ought to be adopted, if the court were against the defendants on the first point, after the argument had proceeded some way, the counsel for the parties effected a compromise, leaving the Court to decide only the first point taken by the defendants. We therefore give judgment on that point only against the defendants, leaving the damages to be ascertained in accordance with the arrangement arrived at by the parties."

In Goodall v. Clark, 23 O. L. R. Clute, J., at p. 620, speaking of Michael v. Hart, says: "It seems doubtful if the extreme view laid down by Wills, J., is good law" and suggests that the assessment should be made as though by a jury.

Especially in view of the contract and the special circumstances, I will not allow the plaintiff the highest peak. Whatever the decision of the Court of Appeal might have been upon that point, I do not think the principle applies here.

There will be judgment for the plaintiff for $225 damages, together with the $406.25 in court.

Had the defendants on the 7th of August paid that amount to the plaintiff, or had they sent him a statement of his account with a cheque to balance in the ordinary way, perhaps there would have been less trouble.

The plaintiff will have the costs of the action.

THE

Western Law Reporter

VOL. XXX. TORONTO, APRIL 12, 1915. No. 16

MANITOBA.

MACDONALD, J. FEBRUARY 24TH, 1915.

TRIAL.

RE TRANSCONTINENTAL TOWNSITE CO. LTD.

Company — Winding-up — Leave to Bring Action After Making of Winding-up Order.

Plaintiff company entered into an agreement with defendant company for the sale to the latter of certain lands the consideration for which consisted of other lands. It was agreed that conveyances were to be executed by the parties upon the happening of certain contingencies. Defendant took possession of plaintiff's property and entered into agreements with respect to it. Upon the happening of the said contingencies defendant company which had gone into liquidation refused to carry out its agreement with plaintiff company:—

***Held*, that the Master rightly exercised his discretion in granting leave to the plaintiff company, which was ready and willing to carry out its part of the agreement, to bring an action, after the making of a winding-up order, for specific performance of the said agreement or in default for its cancellation.**

An appeal from the Master granting leave to the plaintiff to institute an action against defendant company, and proceed to trial notwithstanding an order winding up defendant company.

H. J. Symington, for Transcontinental Townsite Co.

W. H. Curle, for Plainview Farming Co., Ltd.

MACDONALD, J.:—Sec. 22 of the Winding-up Act, ch. 144, R. S. C., provides that, "After the winding-up order is made no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes."

The granting of leave is discretionary. The Master has exercised his discretion, granting leave to bring action. Should this be interfered with?

The plaintiff in the action is the Plainview Farming Company, Limited, hereinafter referred to as the plaintiff, and the defendant is the Transcontinental Townsite Company.

The plaintiff entered into an agreement in writing with the defendant for the sale to the defendant of certain lands part of section nine (9) township twenty-two (22) and range five (5) west of the third meridian in the province of Saskatchewan, for the price or sum of thirty dollars per acre, transfer thereof to be made by the plaintiff as soon as the said Grand Trunk Pacific Branch Lines Company should have definitely located their station grounds, and the area of part of the said land surveyed and the area thereof determined. In consideration whereof the defendant agreed to sell and convey to the plaintiff certain other lands, being a portion of the east half of the said section nine (9) for the price of thirty dollars per acre, the transfer to be made by the defendant as soon as the said railway company should have definitely located their station grounds and the land to the south of the right of way surveyed and the area thereof determined, and also to pay in cash a sum equal to thirty dollars per acre for the number of acres by which the area of land transferred to it should exceed the area of land transferred by it, together with interest.

In and by the said agreement it was further agreed that the said agreement should be completed within one year from the second day of September, 1913, when each of the said parties should by transfers in the usual statutory form convey the land by them respectively agreed to be conveyed as aforesaid.

By the statement of claim issued it is alleged that the Grand Trunk Pacific Branch Lines Company has definitely located its station grounds and the lands to be conveyed by the plaintiff to the defendant have been surveyed and the area determined and the land to be transferred to the plaintiff by the defendant has been surveyed and the area thereof determined.

The plaintiff also alleges being ready and willing to perform the said agreement, but that the defendant refuses to perform the same.

The plaintiff asks for specific performance of the agreement or in default that the agreement be declared cancelled and at an end.

There does not appear to have been any money changed hands between the parties, and all that the plaintiff asks is that the agreement be carried out or in default that they get their own property back.

The plaintiff's rights seem to me even stronger than the case of a mortgagee whose right to proceed by action against a company being wound up seems recognized: Lloyd v. David Lloyd & Co., L. R. 6 Ch. D. 339.

Counsel for the defendant states that sales have been made to various purchasers of parts of the property purchased from the plaintiff and that the hardship both upon the defendants and upon the purchasers would be very great if the plaintiffs are allowed to proceed. This would indicate that the defendants have entered into possession of the plaintiffs' property, entered into agreements of sale with respect to it, and the plaintiffs have nothing, neither money for their property nor yet any control over the property itself. Counsel for the plaintiff further urges that a little delay will enable the plaintiffs to complete and fully carry out their agreement with the defendant and thus the hardships referred to be averted. This protection no doubt will be granted later, but in the meantime I am of the opinion that the plaintiffs are entitled to proceed with their action and the appeal must be dismissed with costs in the cause to the plaintiff.

Appeal dismissed.

MANITOBA.

CURRAN, J. FEBRUARY 22ND, 1915.

TRIAL.

CHALMERS v. CAMPBELL.

Principal and Agent — Sale of Leasehold — Commission — When Payable—Efficient Cause.

The following agreement between principal and agent entitles the latter to his commission upon the execution of the agreement for sale and payment of the cash instalment: "In the event of your making a sale of my interest in the above, I will agree to sell at $50,000 net to me, $20,000 cash, balance in one and two years, 6 per cent. interest. Anything over and above this amount you may retain as your commission."

Where the act of an agent is the *causa causans* of a sale, the subsequent alteration by mutual agreement of principal and purchaser of the terms of payment cannot deprive the agent of his right to commission or postpone the date of the payments thereof.

An action brought by plaintiff for commission alleged to be due him by defendant upon a sale of latter's leasehold interest in the hotel premises in the city of Winnipeg, known as the Mariaggi Hotel, together with furniture and contents owned by defendant.

George A. Elliott, K.C., B. L. Deacon, for plaintiff.

C. H. Locke, for defendant.

CURRAN, J.:—The plaintiff's agency is in virtue of the following document (exhibit 1), which the defendant admits he signed:

"Winnipeg, December 17, 1913.

"To H. A. D. Chalmers,
Winnipeg.

Re Mariaggi Hotel.

"Dear Sir:—In the event of your making a sale of my interest in the above, I will agree to sell at fifty thousand dollars ($50,000) net to me, twenty thousand dollars ($20,000) cash, balance in one and two years, 6% interest. Anything over and above this amount you may retain for your commission. The purchaser to assume payments on two cash registers and half cost of kitchen range, total on above articles $1,150.

"(Sgd.) T. B. Campbell."

On receiving the above authority, in fact on the same day, the plaintiff introduced to the defendant as an intending purchaser of the hotel premises one Fred Morgan, and a verbal agreement was then made to effect a sale at the sum of $52,500. The parties, plaintiff, defendant and Morgan, then went to the law office of Machray, Sharpe & Dennistoun, where instructions were given to prepare a written agreement to evidence the verbal bargain so made, as the result of which exhibit 8 was prepared by Mr. Sharpe of this firm, who were acting for the defendant, also the purchaser Morgan, and the landlord of the premises. This document was drawn in duplicate and Sharpe says in his evidence that one duplicate was signed by Morgan, the purchaser, and the other by the defendant, and that Morgan got one copy of the document and the defendant the other. The one produced, exhibit 8, is signed by the defendant and is the defendant's copy of this document.

It is to be observed that the terms of payment vary a little from those provided for by exhibit 1, namely, as to the date when the last of the deferred payments was to be made. However, the defendant assented to this change and agreed to the terms of sale as set forth in exhibit 8. The cash payment of $7,000 referred to was by the agreement acknowledged to have been paid. As a matter of fact this sum was paid over by Morgan to the defendant's solicitors on January 2nd, 1914, as appears from exhibit 11, a copy of the ledger account of the defendant in the books of his solicitors, Machray, Sharpe & Dennistoun. The same account also shews the receipt from or on behalf of Morgan of $6,000 and $9,000 on January 20th, 1914, on account of this sale.

The defendant contends that the sale did not go through in accordance with exhibit 8, and that a subsequent agreement, exhibit 10, was entered into between him and the purchaser Morgan, varying some of the terms of exhibit 8, which the purchaser, it is said, could not carry out. The subsequent payments of $6,000 and $9,000 respectively were in fact made after exhibit 10 had been signed by Morgan. Both parties admit that exhibit 8 and exhibit 10 must be read together, and that exhibit 8 is still binding upon the parties, except in so far as its provisions are varied by exhibit 10.

The defendant says that the difficulty arose because Morgan could not put up the $15,500 payable on December 22nd,

1913, under exhibit 8, until the 17th or 19th of January, 1914.

It seems that the defendant held from the owner only an agreement for a lease conditional upon his making certain improvements to the building. Part of these improvements had been made at the time of the sale in December, but considerable remained to be done, and the defendant having become financially embarrassed was unable to complete them. He admits that he was responsible to his landlord for the making of these improvements and I have no doubt that Morgan, notwithstanding the language of exhibit 10, was simply carrying out for the defendant what the defendant was then obligated to do in the matter of these improvements.

Exhibit 10 is somewhat difficult to comprehend, but the defendant's counsel admits in his argument that the amount of the purchase money was not changed by it but merely the terms of payment. One thing is quite clear, that the cash payment was really $22,000, and instead of the defendant getting the whole of this amount himself $6,000 was devoted to completing the building improvements that the defendant was obligated to make, and this sum is tacked on to the deferred payments and is ultimately to be paid by the purchaser instead of being in terms of agreement exhibit 10, treated as part of the cash payment. This arrangement is, I think, purely fictitious. The purchaser in fact put up the money and it was expended in improvements which the defendant was bound to make. In fact the arrangement was made merely to satisfy the landlord, who would not agree to trust the defendant with the money and so required it to be put in the hands of his solicitors for direct expenditure in the improvements which he had agreed to accept as sufficient to satisfy the conditions upon which the defendant was to become entitled to his lease.

Such being the case I fail to see how this $6,000 can be treated otherwise, as between the defendant and the plaintiff, than a part of the cash payment stipulated for in the agency agreement with the plaintiff.

The defendant's whole contention now seems to be that the plaintiff's action is premature, because the commission is not yet payable or was not when the action was begun. If this contention is correct, I am at a loss to understand when the commission could be said to have become legally payable.

It seems to me it was payable when exhibit 8 was executed and the cash payment made.

However, the defendant's contention appears in full from his examination for discovery, when he was asked the following questions and gave the following answers, which were put in at the trial by the plaintiff:—

"92. Q. So that really as far as you are concerned it is not a question of his being entitled to $2,500: he is entitled to that, there is no dispute? A. None whatever, I told him at the time Mr. Morgan was an old client of mine, that I had spoken to him some months ago, even a few weeks, but I had spoken to him so often about the matter that I had abandoned the idea, while I had made a big reduction in the price of the hotel it was only due to Mr. Carol having taken action to put the bailiff in charge of the hotel.

"94. Q. The only question between you then is that he is claiming too soon? A. That is all. I am perfectly satisfied he should get his commission. I think he is entitled to it, and he knows I tried to help him put the deal through and I tried to get him as much as I could. I told him that would be for the amount of the commission before I signed exhibit 1. I said it was more than was coming to him, but I was prepared to help him out, and I also tried to borrow some money on properties he was interested in, approximately $710.

"95. Q. Do you remember being in Machray, Sharpe & Dennistoun's office on the 6th of February, 1914, and Mr. Sharpe writing a letter to the manager of the Sterling Bank? A. I do. I have got a copy of it. (Copy produced by defendant is a copy of the original exhibit 2 at the trial.) I may say that this letter was written for the purpose of trying to aid Mr. Chalmers at my request to get a loan of a certain sum of money, I think about a thousand dollars, and which I was willing to go on the back of a note to enable him to get something, and that I would be protected but that from the commission when it was due."

Now, this letter, exhibit 2, which Mr. Sharpe wrote on behalf of his firm, addressed to H. W. Bodman, assistant manager of the Sterling Bank, Winnipeg, gives a somewhat lengthy explanation of the whole transaction out of which plaintiff's right to a commission arose, and contains this explicit statement, unqualified in any way. "Mr. Chalmers, under arrangements with Mr. Campbell, is entitled to a com-

mission of $2,500," and goes on to state that "unfortunately, although Mr. Campbell has considerable equity, he is unable to raise sufficient cash to pay this at once," meaning the plaintiff's commission. Now, the defendant admits that he instructed Mr. Sharpe to write this letter.

"101. Q. But this proposal of getting some money for Chalmers had been discussed between you? A. Yes.

"102. Q. And then you instructed Mr. Sharpe to write a letter as a result of this discussion, to the bank? A. Yes."

The letter was accordingly written and handed to the plaintiff, who took it to the Sterling Bank, but was unable to raise any money on the strength of it.

I take this letter to be a clear admission of the plaintiff's present right to the commission sued for. To view it in any other light, would I think, mean that a fraud was contemplated on the bank, and I do not think for one moment that any such matter was present to the mind of the writer. I am satisfied it was not, and that the letter was written in perfect good faith to assist the plaintiff to raise money at this bank, aided by the defendant's credit, and on the strength of this large sum for commission being then due the plaintiff by the defendant, but which the defendant was then financially unable to pay. I think the defendant so understood the situation, and I think Mr. Sharpe also so understood it.

In the face of these facts I confess I am at a loss to understand why the defendant has defended this action. I do not think, as a matter of law, that the subsequent alteration by mutual agreement of the parties of the terms of payment set forth in exhibit 8 can deprive the plaintiff of his rights to a commission, or in any way postpone the date of payment of commission then earned.

The defendant says he was not aware of the subsequent agreement, exhibit 10, but I do not believe this. Both Sharpe and the defendant expressly state that the plaintiff was fully apprised of the changes in the first agreement effected by exhibit 10, and I think he was. But his knowledge, in the absence of an agreement binding upon the plaintiff to postpone his right to payment of his commission so earned, would not, in my opinion, affect him to his prejudice.

There can be no doubt, upon the admissions of the defendant himself, that the plaintiff effected a sale, which was substantially in accordance with the terms of his authority, exhibit 1. Such slight departure as there was in regard to the

last of the deferred payments was assented to by the defendant, and the sale closed upon the basis set forth in exhibit 8. I think the plaintiff had then done all that he was obliged to do to entitle him to payment of his commission.

In Green v. Bartlett, 1863, 14 C. B. N. S. 681, Erle, C.J., says: "If the relation of buyer and seller is really brought about by the act of the agent he is entitled to commission, although the actual sale has not been effected by him." Or in the words of the later authorities, "the plaintiff must shew that some act of his was the causa causans of the sale," Tribe v. Taylor, 1876, 1 C. P. D. 505, 510, or "Was an efficient cause of the sale," Miller v. Radford, 1903, 19 T. L. T. 575. See also Burchell v. Gowrie, [1910] A. C. at p. 614.

I do not see that there can be any doubt on the question of fact that the plaintiff's acts were in this case an efficient cause of the actual sale, and I hold that he is entitled to succeed.

The defendant had loaned the plaintiff some money upon the notes, exhibits 6 and 7, amounting to $370, bearing interest at 8 per cent. This money the plaintiff asserted was advanced on account of his commission. I hold to the contrary, and as these notes have not been paid, the defendant is entitled to have the amounts now due upon them off-set against the commission.

The plaintiff at the trial, by leave of the court, amended his statement of claim by giving credit for the amount of these notes, so that the matter is easily adjusted.

At the trial, by leave of the court, the defendant amended his statement of defence by setting up that the plaintiff had, since the commencement of the action, assigned his cause of action to a third party, one Arthur C. Miller. I allowed the plaintiff to further amend by adding Miller as a party, which was accordingly done, as it seemed to me not in the interests of justice to force the assignee to bring another action in respect of the subject matter of this action.

There will be judgment, therefore, in the plaintiff's favour for $2,500, less the amount with interest of the notes, exhibits 6 and 7. Upon such amounts being credited on the judgment the plaintiff Chalmers will be entitled to delivery up to him as paid of the said notes. The plaintiff will be entitled to the usual costs, to be taxed, and costs of necessary examinations for discovery.

I do not think this is a case where the statutory limit should be removed, and I deny the plaintiff's request made at the conclusion of the trial that this should be done.

BRITISH COLUMBIA.

GREGORY, J. MARCH 1ST, 1915.

TRIAL.

BOYDELL v. HAINES.

Vendor and Purchaser—Agreement for Sale of Land—Action on Covenant for Payment of Installment—Objections to Title — Waiver — Entry into Possession with Knowledge of State of Title—Abstract of Title—When Vendor must Furnish — Personal Judgment and Foreclosure—Right of Purchaser to Rescind — Necessity for making Immediate Restitution—Costs.

A purchaser who, knowing the state of the title at the time of entering into an agreement to purchase, goes into possession, subdivides the property, and enters into an agreement for the sale of an interest in it, thereby waives all objections to title.

A vendor need not furnish an abstract of title unless a demand is made therefor.

In an action on a covenant, contained in an agreement for the sale and purchase of land, for payment of an instalment of purchase money, the vendor is not entitled both to a personal judgment and foreclosure.

A purchaser is not entitled to the rescission of an agreement to purchase unless he is in a position to make immediate restitution; it is not enough that he can get in the interest he has sold and then make restitution.

In an action on a covenant, contained in an agreement for the sale and purchase of land, for payment of an instalment of purchase money, persons added as defendants who put in no defence and who know that no personal judgment is claimed against them are not entitled to any costs for attendance of counsel.

An action by the plaintiff to recover an installment of purchase money due under an agreement for the sale and purchase of land entered into between plaintiff and defendant Haines.

Thornton Fell, K.C., for plaintiff.

G. B. S. Phelan, for defendant Haines.

F. C. Elliott, for defendant Middleton.

H. E. H. Courtney, for defendants Ryan and Lang.

GREGORY, J.:—The defendant contends that the plaintiff is not entitled to judgment on the following grounds:—

(1) That the vendor never furnished an abstract of title and that the property duly registered in the name of the plaintiff is encumbered with two mortgages, the first of which for $8,000 matured before the instalment for which he is now sued became due;

(2) That the plaintiff never gave the thirty-day notice required by the agreement for sale; and

(3) That the plaintiff is not entitled to a personal judgment and foreclosure with a reference to the Registrar to ascertain the amount now due under the agreement.

As to the first objection, it appears to me to be fully met by the plaintiff. There is no doubt on the evidence that the defendant knew of the existence of these mortgages at the time he entered into his agreement to purchase, and that title to the property had been duly investigated by his agents. The plaintiff also testifies that he told the defendant Haines of the existence of the mortgages and said that he intended to pay them off out of the moneys to be received by him from the defendant. He gives no evidence as to what Haines said in reply to this, and I think it must be taken that he agreed to it for he afterwards went into possession, subdivided the property, and entered into an agreement for sale of an interest in it. This seems to me to bring this case within the decision of Wallace v. Hesslein (1898), 29 S. C. R. 171. He knew the state of the title and waived all objections (if any) to it.

The authorities quoted to shew that it is a vendor's duty to furnish an abstract of title are, of course, unquestionable, but it is not necessary for him to do this without a demand, and no demand was made in the present case until the 21st October, and the trial took place on the 26th of the same month. It is quite clear that this demand was an afterthought. If further proof of this was required it is shewn by the fact that in a previous action for interest overdue, this defence was not raised.

As to the second objection that the plaintiff has not given the thirty-day notice required by the agreement, it seems to me that that notice has no application to an action on a covenant for the payment of an instalment. An examination of the agreement shews that the object of the notice is to enable the vendor, without the aid of the court to himself declare

the agreement to be null and void and forfeit the moneys already paid after the expiration of the notice. The plaintiff has not attempted to do that here, but brings his action on defendant's covenant to pay on the date named.

As to the third objection, I think it is good; see Hargraves v. Security Investment Co. (1914), 29 W. L. R. 317, where the Supreme Court of Saskatchewan en banc dealt with this very question arising as in the present case out of an agreement for the purchase and sale of property.

The defendant counterclaims for rescission of the agreement and return of the cash payment made by him and a reference to the Registrar, and in the alternative for an order directing the plaintiff to discharge the mortgages registered against the property.

It seems to me that he entirely fails. While it may be admitted that a purchaser is entitled to have an encumbrance of which he had no knowledge discharged before he makes any payment (other than the payment made when the contract was entered into), it is quite a different thing to say that he can insist upon having an encumbrance discharged of which he had full knowledge at the time he entered into his contract, and it seems to me that having had this knowledge, having entered into the agreement, taken possession and resold an interest, it must be taken that he agreed with the plaintiff that the plaintiff should be allowed as he states to pay the encumbrancers out of the moneys to be received from the defendant.

It is also to be noted that while the defendant is seeking rescission and a return of his money, he makes no allegations nor does he attempt to prove that he was at all times ready and willing to perform his part of the contract, and it is quite clear to me that he was not ready, and that he is only seeking a way of escape from his obligation. In any case he cannot have rescission unless he is in a position to immediately make restitution, it is not enough for him to say he can get in the interest he has sold and then make restitution.

It would, however, be unfair to require the defendant to make his payments without being properly secured, he is entitled to see that his money is applied on the mortgages.

The result is that the counterclaim will be dismissed and the plaintiff will be entitled not to a personal judgment, but to an order for the payment by the defendant Haines of the

amount sued for with interest and costs into court on or before the 1st of May next, and in default of such payment, all his right, title and interest and of anyone claiming through or under him, in and to the lands, be absolutely barred and foreclosed and the agreement sued on declared void and at an end.

The plaintiff will be entitled to both the costs of the action and of the counterclaim.

As between the plaintiff and the other defendants the plaintiff is entitled to no costs, as they were made party defendants by the plaintiff as a matter of precaution and for his own protection—they were not parties to the agreement and put in no defence—the presence of their counsel at the trial imposed no additional expense on the plaintiff; they, on the other hand, are not entitled to any costs for attendance of counsel for they knew that no personal judgment was claimed against them, Mr. Fell having so stated at the beginning of the trial when their counsel said they were only present to prevent such personal judgment. The apparent claim against them in the statement of claim was clearly a typographical error—the letter "s" being added to the word defendant in two places, making it appear that they were parties to the agreement when they knew they were not.

It is unnecessary to refer to the third mortgage for $1,000, for it was given after the agreement, registered after it, and was, therefore, subject to it, and no encumbrance on the title.

As some complications may arise after the payment of the money into court or otherwise, there will be general leave to apply.

SASKATCHEWAN.

LAMONT, J. MARCH 5TH, 1915.

TRIAL.

SCHARF v. DILLABOUGH.

Sale of Goods—"Actual and Continued Change of Possession"—Bills of Sale Act.

Where there is a sale of goods which at the time of the sale are not in the possession of the vendor, but in the possession of a third party, and that third party is made aware of the sale and consents to the goods remaining in his possession as the goods of the vendee, that is sufficient actual change of possession to support the sale.

Trial of an interpleader issue.

W. Mills, K.C., for the claimant.

W. H. B. Spotton, for the defendant.

LAMONT, J.:—Although there was some confusion in the claimant's evidence I see no valid reason for holding that the transaction as related by him was not bona fide. The facts of this issue, as I find them, are as follows: In May, 1913, one Allan Scharf, a brother of the claimant, became indebted to Dillabough, for which indebtedness he gave a promissory note. Allan Scharf was also indebted to the claimant Fred Scharf. In July or August, 1913, Allen Scharf offered to sell the hearse in question and an ambulance to the claimant for $200, the amount to be credited on his account. On September 15th the claimant agreed to buy at that price, and he gave his brother credit in his books on that date. The hearse was then in a garage owned by one Kennedy, in Moose Jaw. After completing the deal with his brother, which took place, the claimant says, at Kennedy's garage, the claimant asked Kennedy if he could leave the hearse in his garage, as it was too high to go into his own barn . . . Kennedy said he could leave it there until such time as he, Kennedy, would require the room it occupied. It was left at Kennedy's garage until November 11th, at which time there was snow on the ground, when the claimant took the wheels off in order to put it on runners or skids, and took it to his own barn. He kept it there all winter, and

in the following spring took it out and took it to a painter to get it painted; in June, 1914, he paid the painter $35 for painting it, and took it away. At that time his brother Allan Scharf had a garage, to which the claimant took the hearse. In December, 1913, the plaintiff Dillabough obtained judgment and issued execution against Allan Scharf. On July 29th, 1914, the sheriff issued his warrant to seize the goods of Allan Scharf to satisfy the execution. The seizure was made in October, at which the hearse in question was seized. The claimant claimed the hearse and the sheriff obtained an interpleader order. For the execution creditor it is contended that the claim is void under the "Bills of Sale Act," because that Act requires that where no bill of sale is registered there must be an immediate delivery followed by actual and continued change of possession. The question here is: Was there an actual change of possession sufficient to support the sale? To start with, I think we may take as settled law the statement set out in the last edition of Barron & O'Brien (1914 ed.), where the author says at page 393:

"Registration of a bill of goods is not necessary when the goods are in the hands of a warehouseman, who becomes the agent of the transferee and agrees to hold the goods for him."

For that statement the learned author cites Jones v. Henderson, 3 Man. L. R. 433, and Re Cunningham, 28 Ch. D. 682. In McNichol v. Brucks, 6 Terr. L. R. 184, a vendor sold certain cattle which he had in a pasture field which he had rented. On the same day he transferred to one Klump the lease of the pasture field; the following day the vendee of the cattle applied to Klump for permission to leave the cattle in the pasture, where they were looked after by the vendee and his servants. The vendor subsequently sold the same cattle to one Brucks. It was held by Mr. Justice Wetmore that there had been a sufficient actual and continued change of possession to support the sale.

As to whether or not the consent of a person who is in possession of the goods at the time of the sale, to hold them for the vendee, is a sufficient change of possession to support the sale, I refer again to the same edition of Barron & O'Brien on Bills of Sale, at p. 387, where the author says:—

"And it is submitted that where goods are in an unoccupied shop or warehouse, under lock and key, the mere delivery of the key, which formerly was held to constitute a

sufficient compliance with the Act, would no longer suffice, though, if notice to the landlord or his agent in charge of the building were also given, such might be considered as an open and sufficiently public change of possession."

As authority for that they cite the case of Gough v. Everard, 11 W. R. 702. In that case the vendor sold a quantity of timber lying partly on a public wharf, and partly on a private wharf owned by the vendor himself. He gave the key of the private wharf to the vendee, and notice of the sale was given to the wharfinger of the public wharf. The sheriff seized the timber under an execution against the vendor. In an interpleader issue it was held that the vendee was entitled, and the ground upon which the learned judges who took part in the trial seem to have based their judgment, so far as the timber lying at the public wharf was concerned, and therefore in the hands of a third party, was that a notice thereof had been given to him. Pollock, C.B., says:—

"There was possession on the part of the plaintiff; no creditor could be misled. The goods had been delivered to the plaintiff; the furniture was in his possession. The timber at the private wharf was under his control, and the wharfinger had had notice that the vendor had sold the timber on the public wharf."

Martin, B., says:—

"The timber was lying partly at a public wharf, and the wharfinger had notice of the sale to the plaintiff, and partly at the private wharf of the vendor, the key of which had been delivered to the plaintiff. The vendor had no apparent possession whatever; the plaintiff was as much in possession as he could be."

From these authorities I gather that the law is, that where there is a sale of goods which at the time of the sale are not in the possession of the vendor, but in the possession of a third party, and that party is made aware of the sale and consents to the goods remaining in his possession as the goods of the vendee, that that is sufficient acual change of possession to support the sale. That being so, I hold that the position of Kennedy here, and the agreement of Kennedy to allow the goods to remain there as the goods of the claimant was a sufficient actual and continued change of possession to support the sale. The claimant's claim, therefore, will be allowed.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

CORISTINE & CO. v. HADDAD.

Evidence — Commission — Principles Governing Granting of—Rule 365.

Where a party depends upon the evidence of certain witnesses residing abroad to make out his case and said witnesses refuse to attend the trial, the said party being powerless to compel their attendance, their evidence may be taken on commission under Rule 365.

Where material witnesses are resident abroad the fact that such witnesses are in the employment or under the control of the party who desires to obtain their evidence does not disentitle such party to an order for a commission.

***Cock* v. *Allcock*, 21 Q. B. D. 1, followed.**

An appeal from an order dismissing the application of the plaintiff to examine witnesses at Montreal.

The appeal was heard by NEWLANDS, C.J., ELWOOD and MCKAY, JJ.

F. L. Bastedo, for plaintiffs, appellants.

B. T. Graham, for defendant, respondent.

The judgment of the court was delivered by

MCKAY, J.:—The plaintiff is an incorporated company, carrying on business in the City of Montreal in the Province of Quebec, and the defendant resides in the Judicial District of Swift Current in this Province.

The plaintiff sues for $350, being the amount of an account claimed to be due and owing by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, namely, one Persian lamb jacket $350.

The plaintiff also claims interest on this amount at the rate of eight per cent. per annum agreed to be paid by the defendant.

The defendant denies the plaintiff's claim; and in the alternative sets up that the plaintiff warranted and guaranteed the jacket to be first class, etc., but that the jacket delivered

did not fulfil the terms of the guarantee, etc., and in the further alternative pleads sec. 16 (1), of ch. 147, R. S. S. (Sales of Goods Act), and that the jacket is not reasonably fit for the purposes required, etc.; and that after notice of its defects, setting them out, he returned the jacket to the plaintiff, and that it is still in the possession of the plaintiff; and also pleads nonfulfilment of sec. 10 of ch. 73, R. S. S. (Foreign Companies Act).

In reply the plaintiff joins issue and claims that the jacket has been returned to defendant after having been repaired, and sets out facts to shew that the Foreign Companies Act does not apply herein.

I give the above summary of the claim and defence to shew that there is nothing of a complicated nature in this action, in fact it is an ordinary action on an account.

The plaintiff has no absolute right to give the evidence of its witnesses otherwise than in open Court before the trial Judge, but Rule 365, under which the application is made, reads:

"The Court or Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or Judge, or any officer of the Court, or any other person and at any place of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct."

This is a copy of the English Rule, and the practice under the English Rule is stated (with authorities cited) in the Annual Practice, 1915, page 656, as follows:

"A commission to examine witnesses abroad will not be granted unless the Court is satisfied:

"(1) That the application is made bona fide.

"(2) That the issue in respect of which the evidence is required is one which the Court ought to try.

"(3) That the witnesses to be examined can give evidence material to the issue.

"(4) That there is some good reason why they cannot be examined here. The reasonableness of the cause depends on all the circumstances of the case. It must be seen that the party applying is not oppressed, and that the other party is not prevented from presenting his case fairly at the trial. . .

"(5) That the examination abroad will be effectual."

It seems to me that all the above propositions are fully satisfied by the affidavit filed in support of the application, made by the director of the plaintiff company.

Apart from the fact that he expressly swears the application is made bona fide I am satisfied it is so made, and he shews that the issues are such as the court ought to try and that the witnesses can give material evidence, and that the examination will be effectual.

The affidavit also satisfies me that the plaintiff cannot compel the attendance of these witnesses at the trial. The director swears he has "asked them if they would be willing to go to Swift Current to attend the trial of this case, and they both state that they are unable to go owing to family as well as business reasons, and they are not willing to go to Swift Current to give evidence in this action."

Now it seems to me this is the best of reasons that they cannot be examined at the trial, namely, that they cannot be compelled to attend. Although they are both in the employ of the plaintiff company it is not shewn that the plaintiff could compel their attendance and I see no way by which the plaintiff could do so; and the fact that they are in the employ of the plaintiff is not a conclusive reason for refusing the application.

"Where material witnesses are resident abroad the fact that such witnesses are in the employment or under the control of the party who desires to obtain their evidence, does not disentitle such party to an order for a commission." Cock v. Allcock, 21 Q. B. D. 1. Also see Lord Esher, M.R., at 180.

The plaintiff depends upon the evidence of these two witnesses to make out his case, and they refuse to attend trial, it cannot compel them to attend and it asks that their evidence be taken under Rule 365.

On the other hand the defendant urges that, as there is likely to be a conflict of evidence, the trial Judge should be in a position to study the witnesses on both sides, their demeanour, etc., and that as he intends to attack the veracity of the witness Kosh it will be impossible for him to sufficiently instruct foreign counsel without going to Montreal.

It must be at once conceded that those are very strong objections, but I do not think they are sufficient for refusing the order in this particular case. As to the latter objection, I think that as the issues raised are not of a special or diffi-

cult nature, counsel in Montreal can be sufficiently instructed to carry out an effective cross-examination. As to the former, all commission evidence is subject to the same objection. I thoroughly realize the importance of having all evidence if possible taken before the trial Judge and that this practice should not be lightly departed from. But occasions will arise when we must for the purposes of justice depart from this well established practice, however reluctantly we may do so.

One of the leading cases in the matter of issuing commissions to take evidence abroad is Cock v. Allcock already referred to, wherein, at page 181, Lord Esher, M.R., stated:

"It is clear that, according to the established practice, it is a matter of judicial discretion, and the commission ought only to be granted on reasonable grounds being shewn for its issue. The matter being one of discretion, it is impossible to lay down any general rule as to when a commission will be granted. It must depend upon the circumstances of the particular case. The Court must take care on the one hand that it is not granted when it would be oppressive or unfair to the opposite party, and on the other hand that a party has reasonable facilities for making out his case, when from the circumstances there is a difficulty in the way of witnesses attending at the trial. All the circumstances of each particular case must be taken into consideration."

Under the circumstances of this particular case, I am of the opinion that the refusal of the application would be depriving the plaintiff of not only "reasonable facilities for making out its case," but the only means it has of making out its case and thereby doing it a positive injustice.

I have carefully examined the authorities referred to by the learned District Court Judge, and it seems to me all these cases can be distinguished from the case at bar. In three of these cases there was an element of fraud.

Murray v. Plummer and Lockhart, 4 W. W. R. 717. This was an application to examine the defendant Plummer, and at page 719 Johnstone, J., states:" . . . that the defendant Lockhart, Plummer's solicitor, knowing the circumstances, took from Plummer a transfer of the property in question in fraud of the plaintiff. This is virtually the plaintiff's case. . . . I think it most important that Plummer, a party to the fraud, if any, perpetrated, should be present at the trial . . ."

Fidelity Trust Co. v. Schneider, 25 W. L. R. 611; Union Investment Co. v. Perras, 12 W. L. R. 76. In these two cases the plaintiffs were suing on note which had been obtained by fraud by the payees McLaughlin Bros. and indorsed by them to the plaintiffs. The question was whether the plaintiffs were holders in due course, and there was apparently strong suspicion that they had notice of the fraud or the McLaughlin Bros. were still interested in the notes.

Canadian Railway Accident Insurance Co. v. Kelly, 8 W. L. R. 738. This was an application to examine officers of the plaintiff company and others at Ottawa, which would require constant reference to the plaintiff's books at Ottawa, and furthermore there is nothing in the report that would shew that it was contended these witnesses would not attend at the trial, but rather that, from a business point of view, it would be impossible for the officers to attend the trial, and that the books were constantly required at Ottawa. The affidavits in support, or at any rate material portions thereof, were on information and belief. In refusing the application Howell, C.J.A., at page 743, says:

"I quite agree that a case might be made out where a plaintiff could be examined on commission, but I think the proof should be of the clearest kind and should depend upon evidence not of information and belief, but of the best nature that could be got . . . ."

Toronto Manufacturing Co. v. Ideal Home Furnishing, 17 W. L. R. 621. This was an application to examine the general manager of the plaintiff company at Toronto on the ground that it would entail great loss and expense for him to attend trial at Winnipeg as his duties as general manager of the plaintiff company required his continued presence in Toronto. Robson, J., apparently held in this case that the usual tests of demeanour and cross-examination in presence of the trial Judge outweighed the above grounds advanced, and refused the application.

It was suggested that we ought not to disturb the discretion exercised by the learned District Court Judge in refusing the order, in answer to this I quote Cotton, L.J., in a similar application. Borden v. Greenwood, L. R. 20 Ch. D. 765.

"No doubt it is a serious matter to differ from three learned Judges. But the Court of Appeal has constantly to deal with matters in which, if they were to rely upon

their respect for the judgments of others, they would often have to affirm orders which they do discharge or reverse. It is the necessary duty of the Court of Appeal to decide and act for itself. . . . We have before us the same materials as the Court below had, and it is our duty to decide whether the judgment of the Court below was or was not erroneous."

On the whole I am of the opinion that this appeal should be allowed, and the order of the learned District Court Judge reversed. Costs to be costs in the cause throughout.

In arriving at the above conclusion I have referred to the following authorities: Armour v. Walker, L. R. 25 Ch. D. 673; Cock v. Allcock, 21 Q. B. D. 1 and 178; Robins v. Empire Printing Co., 14 Pr. R. 488; Ferguson v. Millican, 11 Ont. L. R. 35; Burke v. North-West Col. Co., 7 Terr. L. R. 219.

Appeal allowed.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

HEINRICKS v. WIENS.

Action, Cause of—Persons Persuaded to Abstain from Dealing with Plaintiff — Injury to Trade—No Violation of Legal Right or Commission of Unlawful Act—Use of Lawful Means.

It is not an actionable wrong merely to *induce* or *persuade* a person to do something which he may lawfully do or to refrain from doing something which he may lawfully refrain from doing even if the result is injury to another in his trade.

Allen v. *Flood*, [1898] A. C. 1, followed.

A statement of claim which does not allege the violation of a legal right by defendant or his use of unlawful means, but simply alleges that in consequence of the defendant's persuasion over third persons that the latter have abstained from trading with the plaintiff, does not disclose any cause of action.

An appeal from the judgment of BROWN, J., by which he found that the statement of claim did not disclose any cause of action.

The appeal was heard by HAULTAIN, C.J., NEWLANDS, LAMONT and MCKAY, JJ.

B. H. Squires, for plaintiff, appellant.

J. F. Frame, K.C., for defendant, respondent.

The judgment of the court was delivered by

HAULTAIN, C.J.:—The statement of claim is as follows:

"1. The plaintiff is and has been for several years a merchant at the village of Osler in the province of Saskatchewan, dealing particularly in the sale of oils and gasoline to the inhabitants of the village of Osler aforesaid, and nearby villages and surrounding country.

"2. Practically all the inhabitants of the said village of Osler, the nearby villages and surrounding country are of the Mennonite faith, and are members or adherents of the Neuanlage Mennonite Church, of which the defendant is the Bishop.

"3. On or about the 7th of December, 1913, and on divers and various occasions since the defendant by instructions and teachings in his capacity as Bishop, as aforesaid, unlawfully ordered and forbade the members and adherents of the said Neuanlage Mennonite Church, practically all of whom were customers of the plaintiff, to have any dealings whatsoever with the plaintiff.

"4. By reason of the defendant's position and influence as such Bishop, over the customers of the plaintiff, the defendant's teachings and instructions aforesaid were obeyed and by reason thereof the customers of the plaintiff did cease to have dealings with the plaintiff in his business as merchant as aforesaid, whereby the plaintiff has been deprived of his trade in the community and of the profits of his trade which he had previously enjoyed in the community, and has been utterly ruined in his business aforesaid.

"5. The plaintiff previous to December 7th, 1913, had 350 customers dealing with him in his business aforesaid, but by reason of the defendant's instructions and teachings aforesaid, the plaintiff's customers now number only 20.

"6. On or about the 7th day of December, 1913, the plaintiff had in his possession and owned by him stock-in-trade and fixtures to the value of $3,000, which the plaintiff is unable to sell and which had become a total loss to him."

The pleading in effect alleges that in consequence of the action of the defendant certain persons have abstained from trading with him. There is no averment of "malice" in the sense of a "wrongful act done intentionally without just cause or excuse." The word "unlawfully" is used in paragraph 3, but its use in that connection only begs the question. It is not set up that the defendant induced the

breach of any contract which might have brought the case within the decisions in Lumley v. Gye, 2 E. & B. 216, Bowen v. Hall, 6 Q. B. D. 333, and Temperton v. Russell, [1893] 1 Q. B. 715. There is no allegation of threats, intimidation, molestation or conspiracy to which to apply the cases of Tarleton v. McGawley, 1 Peake, N. P. C. 270, and Garret v. Taylor, Cro. Jac. 567. The case of Giblan v. Labourers' Union, [1903] 2 K. B. 600, was much relied on by counsel for the appellant, but in that case there was what was held to be an unlawful combination to compel employers not to employ the plaintiff. The case of Quinn v. Leatham, [1901] A. C. 495, was also cited, but that case does not apply in the present instance, as it was held there that a combination of two or more without justification or excuse to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable.

This case, in my opinion, comes clearly within the principle of the decision in Allen v. Flood, [1898] A. C. 1. That case may fairly be said to decide that it is not actionable merely to induce or persuade another not to enter into a contract with a third person, even if it is done maliciously and although the third person suffers damage.

It is not an actionable wrong to persuade a person to do something which he may lawfully do or to refrain from doing something which he may lawfully refrain from doing even if the result is injury to another in his trade.

"Persons may be peacefully persuaded provided the method employed is not a nuisance to other people." Per Lindley, M.R., in J. Lyon & Sons v. Wilkins, [1899] 1 Ch. 255, at p. 268.

It may be added that persons may be persuaded, where no breach of contract is caused, unless there is added to the persuasion intimidation, threats, molestation or other illegal means.

In this case there is no violation of a legal right alleged, no unlawful act on the part of the defendant charged, and no suggestion of his use of unlawful means. The statement of claim, therefore, does not disclose any cause of action, and this appeal should therefore be dismissed with costs.

During the argument in appeal, application was made to amend the statement of claim by adding the following paragraph:—

3a. The defendant had by virtue of his position as such Bishop authority to compel such members and adherents not to have any dealings with the plaintiff.

This amendment, it seems to me, if allowed, would effectually put the plaintiff out of court, if he had not been out before. If the defendant had "authority"—and that must mean, legal authority—there is nothing more to be said.

Appeal dismissed.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

CANADIAN BANK OF COMMERCE v. WALDNER AND MURPHY.

Promissory Note—Holder for Value Without Notice—General Letter of Hypothecation—Notes Endorsed to Holder as Collateral Security — Indebtedness of Endorser to Holder Matured and Increased Before Notes Due — Lien —Consideration.

A was the maker of promissory notes in favour of B who endorsed the notes to C as collateral security for his indebtedness:—

***Held,* that the fact that at the time of the said endorsation C held a general letter of hypothecation covering all B's bills, notes, etc., entitled B to a lien upon the notes; that C was the holder in due course since the indebtedness of B to C matured and was increased before the notes became due, C having no notice of any defect; that there was consideration for the retention by C of the notes.**

An appeal by defendant in an action brought by plaintiff as holder of two promissory notes in favour of W. C. Kidd & Co., which were endorsed by the said Kidd & Co. to plaintiff.

The appeal was heard by HAULTAIN, C.J., LAMONT, BROWN, ELWOOD and MCKAY, JJ.

P. H. Gordon, for defendant, appellant.

F. W. Turnbull, for plaintiff, respondent.

The judgment of the Court was delivered by

ELWOOD, J.:—This is an action brought by the plaintiff as holder of two promissory notes made by the defendant in favour of W. C. Kidd & Co., and which were endorsed by

the said Kidd & Co. to the plaintiff. The statement of defence, inter alia, alleges that the notes were not assigned to the plaintiff in due course; that the notes were given for the purchase-price of a stallion sold by the said Kidd & Co. to the defendant subject to certain warranties and guarantees, and there was no consideration for the note. The whole argument turned upon the question of whether or not the plaintiff was a holder for value. Briefly, the circumstances under which the plaintiff received the note in question from Kidd & Co. were as follows: At the time of the receipt of the note, Kidd & Co. were indebted to the plaintiff under a promissory note not then due. Kidd & Co. deposited the notes in question with the plaintiff as collateral to their promissory note to the plaintiff some time after that note was given. At the time of this deposit, and as far as the evidence goes, up to the time of the action, the plaintiff had in its possession from Kidd & Co. a general letter of hypothecation which, inter alia, contained the following:—

"All bills, notes, agreements for payment of money, promises to pay money, debts, accounts, claims, choses in action, and other securities (hereinafter called securities) heretofore or hereafter lodged in connection with the account of the undersigned with the bank or assigned to the bank, have been and shall be so lodged, assigned and held by the bank upon the terms and for the purposes following, viz.:—

"The said securities, and any renewals thereof and substitutions therefor and proceeds thereof are to be held by the bank as a general and continuing collateral security for payment of the present and future indebtedness and liability of the undersigned, and any ultimate unpaid balance thereof, and the same may be realized by the bank in such manner as may seem to it advisable, and without notice to the undersigned in the event of any default of such payment. The said proceeds may be held in lieu of what is realized, and may as and when the bank thinks fit be appropriated on account of such parts of said indebtedness and liability as to the bank seems best."

Prior to either of the notes sued on hereon becoming due, the indebtedness of Kidd & Co. to the plaintiff had matured and had been increased by a sum largely in excess of the amount of the notes sued on herein. This indebtedness kept increasing from time to time up to and until after the second of the notes sued on herein matured. The evidence at the trial shewed that the plaintiff had no knowl-

edge of any defect in the notes sued on herein. It was contended on behalf of the defendant, on the authority of Canadian Bank of Commerce v. Waite, 7 W. L. R. 255, Bank of B. N. A. v. McComb, 18 W. L. R. 94, and Merchants' Bank of Canada v. Williams, 6 W. W. R. 563, that the plaintiff was not a holder for value. In the first two of the above cases it would appear that at the time of the deposit of the notes sued on, the only indebtedness owing by the person so depositing the notes to the bank was an indebtedness accruing due, but not due, and that before that indebtedness became due the bank in each case had notice of a defect in the notes; and it was held that the bank were not the holders for value without notice. The report of Merchants' Bank v. Williams is not very full as to the facts, but I take it that the facts were exactly the same as in the above other two cases. Without expressing any opinion as to the correctness of the decisions in those cases, they seem to me to be quite distinguishable from the present in that in the present case, before either of the notes sued on became due, and without any notice of any defect, the indebtedness of Kidd & Co. to the plaintiff matured and was increased. It will be observed that the effect of the letter of hypothecation above-mentioned was to give the bank a lien upon the notes sued on herein, and I am of the opinion that as soon as the indebtedness of Kidd & Co. to the plaintiff matured, and at any rate after it became increased, the plaintiff became a holder for value. There was a consideration for the retention by the plaintiff of the notes sued on. This view seems to be taken by Perdue, J.A., in Bank of B. N. A. v. McComb (above), at p. 106, where he says:—

"There is some evidence that when Bartlett's note fell due on the 13th June, the plaintiffs exercised forbearance by accepting a renewal on the strength of the collateral security in the shape of the note in question. This might make the plaintiffs holders in course on the last-mentioned date if they had no notice at that time of the invalidity of the note."

In Merchants' Bank v. Thompson, 21 O. W. R. 742, the Chief Justice of Ontario is reported as follows:—

"As endorsees for collection of the note, they were entitled to a lien on it for debts that were then presently payable and from time to time thereafter becoming payable. The claim now made is in respect of an indebtedness of Fox,

which became payable from and after the 24th April, 1908. Prior to that date there was a period in which Fox was free from direct indebtedness, although there were some outstanding notes or drafts under discount, a time during which, according to the plaintiff's manager, Fox was at liberty to take the note out of the plaintiff's possession had he chosen. But Fox did not take it away, and it remained with the plaintiffs until the debts now due and payable had accrued; and unless something had occurred between Fox and Living prior to the 24th of November, which furnished the latter with a defence to an action on the note, the plaintiffs are entitled as holders to a lien for the amount of Fox's indebtedness to them."

The case of In re European Bank, L. R. 8 Ch. at p. 41, is authority for the proposition that the bank would have a lien, apart entirely from the letter of hypothecation, and the case of Gray v. Seckham, L. R. 7 Ch. 683, seems to me authority for the proposition that the bank in this case are holders for value of the note.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

GARDNER v. STAPLES.

Vendor and Purchaser—Sale of Land—Clear Title—Pre-existing Agreement Between Vendor and Third Party to Share Crops—Fructes Industriales—Chattels or Interests in Land.

A entered into an agreement with B, whereby it was agreed that the latter would farm A's land during a certain farming season. B was to harvest and thresh the crop which was to be divided equally between A & B who were jointly to bear the cost of threshing. B, in accordance with the agreement, entered into possession and seeded the land with wheat, flax, and oats. Later on during the farming season A sold the land to C subject to the said agreement:—

Held, that the growing crops of wheat, flax, and oats were not interests in land but chattels.

Held, therefore, that C's certificate giving him a clear title to the land did not confer any interest in chattels, not otherwise acquired, that were on the land at the time he received it.

Held, that the agreement was, at any rate, a license permitting B to go on the land for the purpose of harvesting and threshing, and removing the crops to the elevator.

Held, that C's knowledge of the agreement between A & B and his consent to the terms thereof amounted to a confirmation of the license given to B by A to enter upon the land, do the harvesting and remove the crops.

The appeal was heard by NEWLANDS, C.J., BROWN, ELWOOD and MCKAY, JJ.

Russell Hastings, for plaintiff, appellant.

John Milden, for defendant, respondent.

The judgment of the court was delivered by

MCKAY, J.:—This is an action commenced by Antoine Phillippe Berube, the original plaintiff, and continued by his executor and trustee the present plaintiff.

The original plaintiff claims to have purchased sec. 8, township 39, range 1, west of the 3rd meridian, in this province, from the former owner, Andrew Johnson, on the 17th day of June, 1912, under a transfer of the same date, for the sum of $21,680, and alleges that the defendant in August, 1912, broke and entered into said land, and cut, took and converted to his, defendant's, use some of plaintiff's wheat from off said land, whereby and by other wrongful acts of trespass plaintiff suffered damage, and that defendant refuses to discontinue cutting the plaintiff's said grain.

The plaintiff claims damages and an injunction.

The defendant on the other hand claims that he was justified in entering upon said land and cutting the grain thereon, by virtue of a lease dated 17th May, 1912, made between the former owner Johnson and himself, which gave him the right to enter upon the said land until December 1st, 1912, that he went into possession and occupation of said land under said lease in May, 1912, and so remained until after the commencement of this action when served with an injunction while cutting said grain, that original plaintiff bought the land subject to this lease, that he is entitled to half the said grain, less half of the threshing and twine bills, that plaintiff wrongfully took all the grain and he counterclaims for his share of said grain or damages, etc.

The facts in this case are that Johnson made the agreement, exhibit 2, dated 17th May, 1912, with defendant whereby it was agreed amongst other things, that defendant

would till and farm during the season of farming in the year 1912, and ending December 1st, 1912, all the land theretofore broken and under cultivation upon said section 8. Defendant was to harvest and thresh the crop. Each party to get one-half of the crop raised and to pay one-half the cost of threshing and the twine for binding the grain.

The defendant, about 17th May, 1912, went into possession and occupation, and seeded the land with wheat, flax and oats, and continued in possession and occupation until served with the injunction in this action while he was cutting the wheat.

On the 17th June, 1912, the original plaintiff purchased this land from Johnson through one Dr. Dorien with whom Johnson had listed the land for sale, subject to the agreement with defendant. Dr. Dorien swears that he told the purchaser, the original plaintiff, when the land was sold to him, that the purchaser would get only one-half the crop delivered at the elevator, minus one-half twine and threshing bill, on account of the land being already leased, and that the original plaintiff said "he would buy on those conditions, said it was all right."

This is not denied.

The transfer of the land was signed on the 17th June, 1912, and registered on the 24th August, 1912. The transfer was not produced at the trial and no evidence given of its contents.

The plaintiff claims all the crop and, as a matter of fact, took it all, and rests his claim to the same on his certificate of title to the land dated 24th August, 1912, issued to the original plaintiff subject only to an indorsement thereon of a mortgage from the original plaintiff to Johnson, dated 17th June, 1912.

The question is, under the foregoing facts is plaintiff entitled to all the crop as against defendant?

If the agreement above referred to were a lease, the plaintiff's title would be subject to it by virtue of sec. 66 of the Land Titles Act, and the defendant's claim would prevail.

But from the conclusion I have arrived at it is not necessary to decide that it is.

I am of the opinion that these growing crops of wheat, flax and oats in question in this action were chattels, and

not an interest in land, at the time the plaintiff purchased and continued so to be.

"With respect to fructus industriales, i.e., corn and other growth of the earth which are not produced spontaneously but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods." 1 Halsbury, p. 293, 649; Marshall v. Green (1875), 1 C. P. D. 35, 39.

In Marshall v. Green, which was a verbal purchase of growing trees, it was held it was a purchase of chattels, and not an interest in land. And in Smith v. Surman, 9 B. & C. 561, also a sale of growing trees, it was held it was not an interest in land, and at p. 573 referred to by Lord Coleridge, C.J., in Marshall v. Green, at p. 40, Littleton, J., held, that "if in this case the contract had been for the sale of the trees, with specific liberty to the vendee to enter the land to cut them, it would not have given him an interest in land within the meaning of the statute."

And that the plaintiff and Johnson his vendor so treated them is shewn by the special agreement made as to the sale of the crop, namely, that Johnson was selling only his one-half interest in the crop minus one-half cost of threshing and twine, in fact Johnson could not sell any more than that in these chattels.

In support of plaintiff's contention that he got all the crop, his counsel cited Wood v. Lang, 5 U. C. C. P. 204. I do not think this case is an authority for the case at bar. In the Wood v. Lang case the plaintiff claimed some wheat grown on land he had previously conveyed by deed to defendant, the defendant claimed under the deed, which was put in evidence at the trial, and the defendant offered parol evidence to shew that half of the wheat was reserved to the plaintiff, when the deed was executed, which was objected to as inadmissible. Macaulay, C.J., at pp. 205 and 206, in his judgment states:

"A verbal reservation of the growing crops or half the growing wheat, accompanying *a deed of the land in terms that transferred the right of property in such crops or wheat*, cannot afterwards be set up in opposition to the deed; it is inconsistent with it, and contradictory to its legal import."

Note the above words in italics.

In the case at bar the transfer or deed from Johnson to plaintiff was not put in evidence at the trial, and we do not know anything of its contents except that it must have been a transfer of the land in question as the certified copy of Johnson's cancelled certificate of title produced at the trial shews that it was cancelled on the 24th August, 1912, and a new certificate of title issued on that day to the original plaintiff.

All that we have then in the case at bar, apart from the plaintiff's certificate of title, is the uncontradicted testimony of Johnson and Dr. Dorien that only half the crop was sold to plaintiff. The plaintiff's certificate of title gives him a clear title to the land free of all encumbrances, etc., except the mortgage to Johnson endorsed thereon, and the implied reservations set forth in sec. 66 of the Land Titles Act.

But it does not give him title or ownership or any interest in chattels not otherwise acquired by him that are, or were, at the time he received it, on the land contained in such certificate of title.

If then I am correct in my conclusion that these growing crops were chattels at the time the original plaintiff purchased the land, the defendant's claim to one-half thereof less half the cost of threshing and twine does not affect the plaintiff's title to the land.

At the time the land was sold to the original plaintiff as above stated, Dr. Dorien, Johnson's agent, told him of the lease or agreement to defendant and that he was to get only one-half the crop at the elevator, minus half the cost of threshing and twine, owing to the land being leased.

Now even if this agreement under which defendant cropped the land is not a lease, it would be at any rate a license with an interest, or in other words would give defendant license to go on the land and work there in looking after the harvesting and threshing the crops and removing same to the elevator. He has been put in possession and was in occupation for that purpose.

Marshall v. Green, and Smith v. Surman, above cited, are sufficient authority for this proposition.

When original plaintiff was told the conditions on which and when he was to get the half crop, he would know that defendant would necessarily have to enter, remain and work

upon the land for the purpose of harvesting, threshing and removing the grain. And he consented to the conditions. In other words, he confirmed and consented to the license which defendant had from Johnson to enter and work upon the land in question for the purpose of looking after and harvesting and removing the crop. Wood v. Manley (1839), 11 Ad. & E. 30, 113 Eng. Rep. 325.

I am therefore of the opinion that this appeal should fail.

It was admitted by defendant's counsel at the argument of this appeal that the plaintiff had furnished some of the twine and paid for all the threshing, the judgment of the learned Chief Justice will therefore be varied to the extent that the defendant will be entitled to judgment for one-half the value of the crop to be ascertained by the Local Registrar, less the amount, of the cost of threshing and twine, paid by the plaintiff in excess of his half-share of said crop cost.

As counsel for plaintiff admitted that the defendant had offered to adjust this excess before appeal, there will be no costs to plaintiff.

This appeal will therefore be dismissed with costs, and the judgment below amended as above indicated.

Appeal dismissed; trial judgment varied.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

CAMERON v. ROYAL BANK OF CANADA.

Banks and Banking—Sale of Assets of one Bank to another —Purchasing Bank Covenanting to Pay Liabilities of Selling Bank — Statutory Obligation — Right of Third Person to Sue—Bank Act (R. S. C. 1906, ch. 9, secs. 99 to 111.)

A lien note or agreement in favour of plaintiff was left at the Traders Bank for collection. The note was surrendered by the bank upon payment by one of the makers. Subsequently the said bank sold and transferred all its assets to the Royal Bank, by virtue of secs. 99 to 111 of the Bank Act, which, as part of the consideration, covenanted to assume and pay all the liabilities of the Traders Bank.

The plaintiff demanded a return of the note or the money due thereunder:—

***Held*, that the covenant by the Royal Bank to pay the liabilities of the Traders Bank became a statutory obligation after the agreement containing it had been approved by the Governor in Council under the authority conferred by sec. 102 of the Bank Act.**

***Held*, that the plaintiff might sue the Royal Bank, the rule that a third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may, not being applicable to a statutory obligation.**

The appeal was heard by NEWLANDS, C.J., ELWOOD and MCKAY, JJ.

T. D. Brown, for plaintiff, appellant.

Arthur Frame, for defendants, respondents.

The judgment of the court was delivered by

MCKAY, J.:—The facts in this case are briefly as follows:

The plaintiff was the owner of a lien note or agreement in writing for $255, dated March 24th, 1911, payable the 1st November, 1911, with interest at 8 per cent. per annum till due and 10 per cent. per annum after due date till paid, made in his favour for valuable consideration by J. H. and H. Clavelle.

This note was left at the Traders Bank of Canada at Zealandia, Saskatchewan, for collection, where, on the 23rd April, 1912, J. H. Clavelle, one of the makers, paid the amount due on the note to the Traders Bank, and the note was surrendered to him.

The Traders Bank, by virtue of secs. 99 to 111 of the Bank Act (ch. 9 R. S. C. 1906), sold and transferred all its assets to the defendant bank, under an agreement dated the 3rd day of July, 1912, made between the said two banks, and which agreement was approved by the Governor in Council on the 3rd day of September, 1912.

By this agreement, as part of the consideration the defendant bank covenanted to assume and pay all the liabilities of the Traders Bank. The plaintiff demanded a return of the said note or the money due thereunder, but this was refused; thereupon this action was brought.

The learned trial judge dismissed the plaintiff's action on the ground that he had no right of action against the defendant, and that his only recourse was against the Traders Bank, relying on the authority of Pollock on Contracts, 7th ed., at p. 212 (citing Tweddle v. Atkinson, 30 L. J. Q. B. 265), where it is laid down that:

"The rule is now settled that a third person cannot sue on a contract made by others for his benefit even if the contracting parties have agreed that he may."

From this decision the present appeal is brought by the plaintiff.

It is contended by plaintiff's counsel that the principle of law invoked by the learned trial judge is one applicable solely to contracts, the ground being that there is no consideration moving from the third person; and that this principle is not applicable to the present case because here the obligation is statutory, and not merely contractual, and being a statutory obligation the plaintiff has the right to sue defendant.

I am of the opinion that this contention is correct.

If authorities be required for the proposition that plaintiff has the right to sue defendant if the obligation be statutory, the following are sufficient:—

In vol. 27, Halsbury's Laws of England, p. 483, sec. 939, it is there stated:

"If a duty is laid by statute on any person or authority, every member of the public who is concerned in the performance of it has a right to have that duty performed."

Also see secs. 942 and 398, same volume.

And in Davis v. Taff Vale Railway Company (1895), A. C. 542, at p. 560, Lord MacNaghten says:

"No doubt, it is perfectly true that, as a general rule, no one can enforce a contract who is not a party to it. A third person, though intended to be benefited by a contract, cannot enforce it, because no consideration moves from him. But the simple answer to the argument is, that the obligations in sec. 23 are statutory and not contractual."

Now as to the other question:—

Is the defendant's covenant to pay all the liabilities of the Traders Bank a statutory obligation?

To arrive at a correct conclusion as to this we must consider how and why the defendant bank entered into this covenant.

It appears the Traders Bank desired to sell to the defendant bank and the defendant bank desired to purchase all the assets of the Traders Bank, both banks being chartered banks and, of course, subject to The Bank Act.

It is a well recognized principle of law that a corporation created by a statute for a particular purpose cannot

do anything not authorized by the statute creating it, unless it receives further statutory authority. (Attorney-General v. Great Eastern Railway Co., 5 A. C. 473, at p. 481.) Hence, before 1900 the purchase of the assets of one bank by another bank, now authorized by secs. 99 to 111 inclusive of the Bank Act, could only have been carried out under a special Act of Parliament. (McLaren on Banks and Banking, 4th ed., p. 305.)

By these sections Parliament has delegated to the Governor in Council power to approve of such purchase, on compliance with the conditions therein imposed.

It is also to be borne in mind that banks are created for the benefit of the public generally, and not only for the benefit of the persons immediately interested in the banks. And we find sections throughout the Bank Act for the benefit and protection of the public, such as sec. 91, which restricts the rate of interest recoverable by a bank from its customers to not more than 7 per cent. per annum. Then when we read secs. 99 to 111 we find that Parliament still kept in mind and provided for the benefit and the protection of the public, when passing these sections. Sec. 107 particularly, which in part reads as follows:

"The agreement shall not be approved of unless it appears that—

(a) proper provisions have been made for the payment of the liabilities of the selling bank;

(b) the agreement provides for the assumption and payment by the purchasing bank of the notes of the selling bank issued and intended for circulation, outstanding and in circulation."

When therefore those two banks were making their agreement they had to comply with the statutory requirements for the benefit and protection of the public.

Sub-sec. (a) requires that "proper provisions" are to be made in the agreement for the payment of, in this case, the liabilities of the Traders Bank. When considering what "proper provisions" were made, it is important to bear in mind that the Traders Bank sold all its assets to the defendant bank, consequently there was nothing left wherewith the Traders Bank could pay its liabilities. Even the shares to be allotted and issued by the defendant bank as part of the consideration could, under the agreement, be issued to

the nominees of the Traders Bank, presumably its old shareholders. (Paragraph 7 (a).)

Bearing this in mind then, we find in the petition presented by the defendant and Traders Banks to the Governor in Council therein stated:

"That as will appear by the terms of the said agreement hereunto annexed marked "A," proper provision has been made for the payment of the liabilities of the selling bank, (meaning the Traders Bank)."

The only provisions made by the agreement for the payment of these liabilities are in pars. 2 and 7, the portions of which material to this case are as follows:

"2. The consideration for the purchased premises shall be:

(b) The assumption by the purchaser of all debts, liabilities, contracts and obligations of the vendor (including notes issued and intended for circulation outstanding and in circulation and leasehold obligations) existing on the day this purchase takes effect, including liabilities in respect of any present or future actions, proceedings, claims or demands in connection with any matter or thing."

"7. The purchaser covenants with the vendor;

(c) to assume, pay, discharge, perform, and carry out all debts, liabilities, contracts and obligations of the vendor including notes issued and intended for circulation and leasehold obligations existing on the day this purchase takes effect, including all liabilities in respect of any present or future actions, proceedings, claims or demands in connection with any matter or thing, and including all statutory requirements upon the vendor and its liquidator with respect to the vendor's notes in circulation."

These then are the "proper provisions" referred to in the petition and which the statute requires, by sec. 107, subsec. (a), the defendant bank then having agreed to pay these liabilities, and the agreement having been on the 3rd September, 1912, approved by the Governor in Council under the authority conferred by sec. 102 of the Bank Act, this covenant on the part of the defendant bank to pay these liabilities became a statutory obligation, and the absolute duty of paying all these liabilities was imposed upon it, by such approval. And for the breach of such absolute duty the defendant bank is liable to the plaintiff. (Watkins v. Naval Collier Company, [1912] A. C. 695.)

In Davis v. Taff Vale Railway Co., [1895] A. C. p. 542, which dealt with the construction of local and personal acts of two railway companies, regarding an agreement arrived at between them, it was there held that:

"A clause in a railway company's Special Act limiting the rates for certain traffic—the result of a parliamentary contest between the two companies — has the effect, not merely of a contract between the two companies, but of a statutory obligation which may be enforced by any person chargeable with the rates for such traffic."

And in Halsbury's Laws of England, vol. 7, p. 343, note (h), referring to the foregoing case, it is there stated:

"Where by a contract which is scheduled to and confirmed by a local and personal Act of Parliament obligations are imposed on two railway companies for the benefit of the public, such obligations are to be regarded as statutory and not merely contractual, so that third parties for whose benefit the obligations were imposed are entitled to enforce them."

It is also to be noted that the covenant sued on herein is not a covenant to indemnify, as is the case in paragraph (e) of the agreement intended to protect the directors and other officers of the Traders Bank, but it is a covenant to assume and pay all debts and liabilities of the Traders Bank.

In fact it is the paragraph in the agreement which complies with and fulfils the statutory requirement contained in sub-sec. (b) of sec. 107 of the Act above quoted, which in express words requires the purchasing bank to assume and pay the notes of the selling bank.

Supposing some person held $1,000 in bank notes issued by the Traders Bank, and sued the defendant bank for the payment of the same, I do not think the defendant bank could successfully resist payment. And yet the covenant under which it would be sued for such notes is the same covenant under which the plaintiff sues herein.

The payment of the liabilities of the selling bank, and the payment of its notes are both statutory obligations. Except that in the latter it is compulsory for the purchasing bank to assume the statutory obligation, but in the former it is optional but, having once assumed it, it becomes a statutory obligation.

The learned trial judge says, "if the statute had intended to afford a direct remedy by creditors of the selling banks against the purchasing banks I think it would have done so

in express terms"; and he refers to sec. 111 of the Act, and concludes this section evidently contemplates that the selling bank is to discharge its liabilities.

In my opinion, there is a satisfactory explanation of this.

The Act (sub-sec. (a) of sec. 107), provides that the agreement shall not be approved of unless it appears that proper provisions have been made for the payment of the liabilities of the selling bank.

These "proper provisions" could be made in various ways, not only by the purchasing bank agreeing to pay them, for instead part of the purchase money might be set aside for this purpose, or the selling bank might retain all its cash on deposit, and sell only part of its assets, and if provision were made in this way, then the selling bank could continue to transact business to pay and discharge its liabilities. Apparently sec. 111, in so far as it contemplates the selling bank paying and discharging its liabilities, is for cases where the selling bank does not part with all its assets but makes some "proper provisions" whereby it can pay and discharge its own liabilities. And therefore as Parliament no doubt had in view such cases arising (see beginning of sec. 99), it did not desire to make a hard and fast stipulation that the purchasing bank should pay the liabilities of the selling bank, but provided that "proper provision" should be made.

It might possibly be contended that sub-sec. 1 of sec. 108 is put there for the purpose of making the purchasing bank directly liable to the holders of the bank notes of the selling bank. I do not think so. Sub-sec. (b) of sec. 107 already does this. In my opinion, sub-sec. 1 of sec. 108 is for the purpose of making the purchasing bank liable to the penalties imposed by secs. 125 and 135 of the Act. Were it not for this sub-section, the purchasing bank would not be subject to secs. 125 and 135 for these bank notes of the selling bank, because sec. 107, sub-sec. (b) only says the purchasing bank is to assume and pay these bank notes.

If the learned trial judge is correct in his conclusion that the plaintiff's cause of action is not against the defendant bank but against the Traders Bank, then no "proper provicions" have been made for the payment of the liabilities of the Traders Bank.

The Traders Bank has no assets, it has sold them all to the defendant bank, and the plaintiff cannot follow them.

On the 3rd of September, 1912, all these assets became vested in the defendant bank (sec. 110 of the Act).

If therefore the plaintiff sued the Traders Bank in this case he would only get a judgment and writs of execution with nothing to realize upon.

And the same thing would happen to all other creditors of the Traders Bank—such as depositors who might number in the thousands—if the defendant bank did not voluntarily pay them. In the light the learned trial judge regards this agreement—as a contract for indemnification between the two banks—the only way the plaintiff could recover from the defendant bank would be through the good offices of the Traders Bank. He would first have to sue the Traders Bank, then if the Traders Bank saw fit to do so, it could apply to make the defendant bank a third party to the action. But this would depend entirely on the good will of the Traders Bank, it could not be compelled to do so. If it were not willing to do this, the plaintiff would be in no better position than he is now.

But even if the Traders Bank were willing to do so, it was surely never the intention of the Governor in Council that the creditors, depositors and others of the Traders Bank, who are promised "proper provisions," for the payment of all liabilities of the Traders Bank, should be exposed to such a hazardous and roundabout remedy.

For the foregoing reasons I am of the opinion that this appeal should be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff with costs.

Appeal allowed.

THE

Western Law Reporter

VOL. XXX. TORONTO, APRIL 19, 1915. No. 17

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

SAWYER-MASSEY CO. v. WHITE.

WACHTER v. WHITE, TURNBULL AND ERRATT.

Landlord and Tenant—Acceleration Clause in Lease—Current Year's Rent to Become Due and Payable Upon Seizure of Goods and Chattels Under Execution—8 Anne, ch. 14, sec. 1.

A lease contained a provision that if the goods and chattels on the demised premises liable to distress should at any time be seized or taken in execution or attachment by any creditor of the lessee, the current year's rent would immediately become due and payable and the term immediately became forfeited and void. The said goods were seized by an execution creditor of the lessee before the expiration of the term:—

Held, that, there being no rent in arrear at the time of a seizure, the landlord was not entitled to the benefit of 8 Anne ch. 14, sec. 1, prohibiting the removal of goods seized by the sheriff until the rent due at the time of the seizure (not exceeding a year's rent) had been paid to the landlord by the execution creditor.

Per HAULTAIN, C.J., and ELWOOD, J.:—The effect of the provision in the lease was to render the seizure by the sheriff and the falling due of the rent automatically concurrent.

Per LAMONT and NEWLANDS, JJ.:—The effect of the provision in the lease was to render the seizure a condition precedent to the falling due of the rent.

An appeal from an order of BROWN, J., in Chambers, barring the claim of the claimants A. R. Turnbull and Jacob Erratt.

The appeal was heard by HAULTAIN, C.J., NEWLANDS, LAMONT and ELWOOD, JJ.

W. H. B. Spotton, for A. R. Turnbull and Jacob Erratt, appellants.

T. S. McMorran, for Sawyer-Massey Co. Ltd., respondent.

W. A. Beynon, for Wachter, respondent.

LAMONT, J.:—The claimants are the owners of the south-half 22-18-25-W2nd., and by a lease bearing date the 20th day of August, 1913, they leased the said land to the defendant White for a term of six years. The rent reserved was $2,000, payable on the 1st day of October in each year, the first payment to be made on the 1st day of October, 1913.

The lease contained the following provision:—

"And also that if the term hereby granted or the lessee's goods and chattels on said lands liable to distress shall be at any time seized or taken in execution or attachment by any creditor of the said lessee, . . . then the current year's rent shall immediately become due and payable and the said term shall immediately become forfeited and void."

The plaintiffs are execution creditors of White. Acting under the plaintiffs' execution the sheriff, early in September, 1914, seized all the crop, less exemption, grown by White in 1914 upon the leased premises. On September 8th, the claimants notified the sheriff that they claimed one year's rent and that they were entitled to have same paid to them before the removal of any of the crop seized by him. The execution creditors disputed the claim for rent and the sheriff applied for an interpleader order.

Counsel for the claimants contended that the landlords were entitled to be paid the rents reserved by virtue of the above mentioned acceleration clause in the lease, and the provision of 8 Anne, ch. 14, sec. 1, which in part reads as follows:—

"No goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the

said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of this Act."

It was admitted by counsel for the claimants that, in order to succeed, he must establish that the rent was due at the time the sheriff seized. It was not due by effluxion of time until October 1st. Did it become due by virtue of the acceleration clause? That clause cites that if the tenant's goods are seized then the current year's rent shall immediately become due and payable.

It was contended that the effect of this language was that the rent became due the very moment the sheriff seized; that the falling due of the rent and the seizure were concurrent acts. In my opinion effect cannot be given to this contention. Under the clause, the seizure is necessary to the falling due of the rent; until seizure the rent is not due; upon seizure it immediately becomes due. Seizure, therefore must precede the falling due of the rent as cause precedes effect.

The statute, however, affords protection in case the rent is due at the time of seizure, i.e., when the sheriff seizes the rent is already due.

To get the benefit of the statute, the falling due of the rent must precede the seizure. In the present case the rent was not due until seizure was made and is, therefore, in my opinion, not within the protection of the statute. The meaning which, in my opinion, should be given to the word "immediately" in the clause is: "following without lapse of time" or "directly after in sequence of time."

Another objection to the appellant's claim was that the rent, to come within the protection of the statute, must have been not only due but in arrear at the time seizure was made.

Where rent becomes due on a day certain, the lessee has the whole of that day in which to pay it; it is not in arrear until after midnight of that day. 18 Halsbury, 471; Child v. Edwardes, [1909] 2 K. B. 753. If the rent became due at the time of seizure by the sheriff, the tenant would have all that day to pay it and it would not be in arrear until after midnight on that day. If, therefore, the meaning of the statute is that the rent must be in arrear at the time of the seizure, the acceleration clause in the lease could not have

the effect, (even if we accept the appellant's contention as to its meaning), of making the rent in arrear at the time of the seizure. That such is the meaning of the statute seems clear, not only from its language where it subsequently refers to the rent as "rent in arrears," but also from the following authorities: In Foa on Landlord and Tenant, p. 16 the author says:—

"The object of the Statute of Anne being to compensate the landlord for the loss of his right of distress, it may be laid down for a general rule that the statute applies only where such right cannot be exercised, or where, having been exercised, its fruits have been abandoned at the tenant's request."

In Woodfall's Law of Landlord and Tenants, at p. 559, the author says:—

"The landlord is entitled to a full year's rent (if as much is in arrear) notwithstanding he has usually remitted some portion of it to the tenant."

In Wharton v. Naylor, Patteson, J., in referring to the object of the Statute of Anne, says:—

"There seems therefore to be no reason why he (landlord) should be held to be authorized by the Statute of Anne to do that which at common law he could not do, viz., to distrain goods in custodia legis, but rather that that Act intended to give him protection by liability of the sheriff in lieu of his right of distress under a fieri facias."

See also Bullen and Leake's Precedents, 6th ed., at p. 478, where, according to a form given, the plaintiff in an action against a sheriff for removal of goods taken under execution without first paying the rent, must allege that the rent claimed was due and in arrear at the time the sheriff seized. In Thomas v. Murehouse (1887), 19 Q. B. D. 563, which was also an action against a sheriff for removing goods without payment of the rent, Lindley, L.J., said:—

"All that the landlord has to prove in order to entitle himself to the amount of the rent as damages is that the rent is in arrears, that the sheriff has had notice of this and that he has notwithstanding removed the goods."

In In re MacKenzie, [1899] 2 Q. B. 566, Lindley, M.R., again indicated that the rent which came within the protection of the Statute of Anne was rent in arrear, in the following language:—

"A tenant's goods seized by a sheriff under a writ of execution could not be distrained for rent, they were said to be

custodia legis and protected from seizure by the landlord, nor could be, before the Statute of Anne, by giving the sheriff notice or otherwise, obtain payment by the sheriff of the moneys realized by him by the sale of the goods seized. The law in this respect was altered by 8 Anne, ch. 14. This statute did not give the landlord a right to distrain, but it prohibited the removal of the goods seized by the sheriff until the landlord's rent in arrear (not exceeding one year's rent) had been paid by the execution creditors."

In Clarke's Law of Landlord and Tenant at p. 583, the author says:—

"It may be laid down as a general rule that the landlord is only entitled to the benefit of the statute where he cannot distrain by reason of the goods being in the custody of the law; but it is clear that he must have otherwise the right to distrain."

These authorities lead me to the conclusion that the Statute of Anne was passed for the protection of the landlord where the sheriff seized under execution at a time when the landlord's rent was due and he could have distrained therefor. As it appears in this case that no right to distrain for rent existed at the time of the seizure by the sheriff, the claimants cannot succeed.

The appeal will, therefore, be dismissed with costs.

ELWOOD, J.:—I have read the judgment herein of my brother Lamont, but I am of the opinion that the effect of the provision in the lease was to cause the rent to become due the very moment that the sheriff seized; that in effect the seizure by the sheriff and the falling due of the rent were automatically concurrent.

I am, however, of the opinion that in order to entitle the landlord to the benefit of the statute the rent must have been in arrears at the time of the seizure; and I therefore concur in the judgment of my brother Lamont in holding that the rent not being in arrears at the time of the seizure precludes the landlord from receiving the benefit of the statute.

The appeal, therefore, in my opinion should be dismissed with costs.

NEWLANDS, J., concurred with LAMONT, J.

HAULTAIN, C.J., concurred with ELWOOD, J.

Appeal dismissed.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

EARLY v. C. N. R.

HODGSON v. C. N. R.

Railway—Animal Killed on Track — At Large Through Wilful Act or Omission of Owner—Railway Act (R. S. C. 1906, ch. 37, sec. 294, as Amended by Statutes of 1910, ch. 50, sec. 8).

Where the owner of horses deliberately and intentionally allows them to get at large and they are killed on the property of a railway company at a point other than at the intersection of a highway and the railway, the owner is guilty of a wilful act or omission under sec. 294 of the Railway Act (R. S. C. 1906, ch. 37, as amended by statutes of 1910, ch. 50, sec. 8) and is thereby precluded from recovering damages.

The rights and liabilities of a railway company in respect of animals at large are declared by sec. 294 of the Railway Act (R. S. C. 1906, ch. 37, as amended by statutes of 1910, ch. 50, sec. 8), and no section of general application contained in the Act should add to or interfere with the specific provisions contained therein; that, therefore, where a horse at large through the wilful act or omission of the owner is killed on the property of a railway, the failure of the company to maintain cattle guards at the point where the horse got on the railway does not subject the company to the liabilities imposed by sec. 427 since its liability under the specific circumstances is declared by the said sec. 294.

An appeal from the following judgment delivered on November 28th, 1914:—

MCLEAN, DIST.CT.J.:—The plaintiffs herein reside in the vicinity of Marshall in the province of Saskatchewan, and bring separate actions to recover from the defendant company damages for four horses killed on the right of way of said company. The plaintiffs for the sake of convenience, as the evidence and questions of law are similar in each case, agreed to have the actions tried together.

The following admissions in both actions were agreed to by the solicitors for the plaintiffs and the defendant company:—

"That the plaintiffs' horses referred to in the statement of claim were struck by a train belonging to the defendant

company and afterwards killed by the company's agent on the right of way, the property of the defendant company, on or about the 18th day of March, 1913."

Of the horses killed the plaintiff Early owned 3, valued at $275, and plaintiff Hodgson owned one horse valued at $150. The plaintiffs in both actions in their statement of claim set out that at or near the village of Marshall aforesaid there is a station belonging to the defendant company on the said company's line of railway and at a point about four miles west of the said station said railway intersects a road and there is a highway crossing at rail level with said crossing; that said company failed to erect and maintain cattle guards on each side of the highway at said highway crossing; that by failure to so erect and maintain cattle guards as aforesaid the horses of said plaintiffs on or about the 18th day of March, 1914, got upon said railway and after being driven for a considerable distance along said railway by a train belonging to said defendant company, were killed by said train, or so injured as to be afterwards killed by said company's agents at a point thereon about three-quarters of a mile distant from said highway crossing.

From the evidence I find the following facts:—The said cattle-guards on each side of said highway crossing were taken up and removed by the section foreman of said defendant company in the winter of 1912-13 and were still up on the said 18th day of March; the said animals got upon the said right of way at the railway crossing aforesaid on said 18th day of March, 1914; the tracks of said horses were seen at said railway crossing and down to the place where they were killed, about a mile from said railway crossing; the animals were running at large at said time, and were not, so far as the evidence shews, in the care of a competent person; the said animals were seen with a bunch of horses on the previous day, the 17th March about 200 yards from said crossing on the public highway. The value of said animals was ascertained by one William Topott, who was asked to examine the animals for said purpose by the section foreman, Frank J. Elson. His value was $275 for the three horses of the plaintiff Early and $150 for Hodgson's mare, so killed as aforesaid. And Elson says: "I placed confidence in Mr. Topott or I would not have taken him." The defendant company in its defence relied on plaintiffs' alleged negligence and its non-liability under sec. 294 of the Railway Act, and also pleaded "Not guilty by Statute."

At the trial Mr. McHugh, counsel for the defendant company, called as witnesses for said defendant company the plaintiffs, and from these witnesses proved that the horses were running at large since March 11th, 1914, when free range came into operation. In cross-examination the said witnesses testified that a by-law of the rural municipality of Hilton was passed permitting animals to run at large after March 11th aforesaid and it was in part of this municipality that the animals were so running at large on the day they were killed. Defendant's counsel also submitted in evidence the statutory declaration for compensation of plaintiff Early, which declaration in answer to question 25 says "Free range."

The sections of the Railway Act which were used in support of this action or contra read with amendments as follows:—

Vol. 1, R. S. C. 1906, ch. 37, sec. 294:—

"No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

"2. All horses, sheep, swine or other cattle found at large contrary to the provisions of this section may, by any person who finds them at large, be impounded in the pound nearest to the place where they are so found, and the pound-keeper with whom the same are impounded shall detain them in like manner and subject to like regulations as to the care and disposal thereof, as in the case of cattle imponded for trespass on private property.

"3. If the horses, sheep, swine or other cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured."

Vols. I-II, 9-10 Edw. VII. ch. 50, sec. 8: "sub-sec. 4 of sec. 294 of the said Act is repealed and the following is substituted therefor:—

"4 When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company, and by reason thereof damage is caused to or by such animal, the party suffering such damage shall, except

in the cases otherwise provided for by the next following section, be entitled to recover the amount of such damage against the company in any action in any court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agents, or of the custodian of such animal or his agent; Provided, however, that nothing herein shall be taken or construed as relieving any person from the penalties imposed by sec. 407 of this Act."

Vol. I, R. S. C. ch. 37, sec. 294, sub-sec. 5:—

"The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the property of the company, and not at the point of intersection with the highway, deprive the owner of his right to recover. 3 Edw. VII. ch. 58, sec. 237.

Ch. 37, sec. 254:—

"The company shall erect and maintain upon the railway,

(a) Fences of a minimum height of 4 feet 6 inches on each side of the railway;

(b) Swing gates in such fences at farm crossings of minimum height aforesaid, with proper hinges and fastenings; Provided that sliding or hurdle gates, constructed before the 1st day of February, one thousand nine hundred and four, may be maintained; and,

(c) cattle-guards, on each side of the highway, at every highway crossing at rail level with the railway.

"2. The railway fences at every such highway crossing shall be turned into the respective cattle-guards on each side of the highway.

"3. Such fences, gates and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway.

Vols. I-II, 1-2 Geo. V. ch. 22, sec. 9:—

"Sub-sec. 4 of sec. 254 of the principal Act is repealed, and the following are enacted as sub-secs. 4 and 5 of the said section:—

"4 The Board may upon application made to it by the company, relieve the company, temporarily or otherwise, from erecting and maintaining such fences, gates and cattle-guards where the railway passes through any locality in which, in the opinion of the Board, such works and structures are unnecessary.

"5. Where the railway is being constructed through enclosed lands, it shall be the duty of the company to take effective measures to prevent cattle or other animals escaping from or getting upon such enclosed lands or upon the property of the company by reason of any act or thing done by the company, its contractors, agents or employees."

The questions I have to decide in this action are:—

(1) Were the plaintiffs guilty of negligence in allowing their horses to run at large without being in charge of a competent person on the date in question?

(2) Would the said animals have got upon the defendant company's right of way and been killed if cattle-guards on each side of said railway crossing had been properly erected and maintained?

(3) Did the defendant company fail to perform a statutory duty in not maintaining said cattle guards, and if so, were they guilty of contributory negligence?

(4) Were the animals killed as a result of the cattle-guards not being maintained on each side of the crossing, and was this the proximate cause resulting in the death of the said animals?

In answer to the first question I cannot find that the plaintiffs were guilty of negligence or wilful act or omisssion. Mr. Justice Perdue in Greenlaw v. C. N. R., 24 W. L. R. 512, defines the word "negligence" as follows: "The word 'negligence' as used in the above section must be interpreted in accordance with the laws of the province, there being no special meaning put upon it by the Railway Act. To do something permitted and authorized by law, something ordinarily done in the municipality by reasonable and prudent men can surely not be held to be an act of negligence. The other words, 'wilful act or omission' give more difficulty. The word 'omission' means the failure to do something which it is one's duty to do, or which a reasonable man would do. The word 'wilful' used in the expression 'wilful default' has been defined as meaning that a person acting as free agent and what has been done arises from the spontaneous action of his will." The learned justice further says: "I think the whole expression 'wilful act or omission' means doing something which a reasonable man would not do, or failing to do something that a reasonable man would do."

If, as the evidence shews, there was free range where the said animals were at large, the plaintiffs cannot be charged with negligence or any wilful act or omission.

The answer to the second question is not a difficult one. I find, and I think the evidence bears out the finding, that if the cattle-guards had been down in their proper place at the time in question the horses would not have got upon the said defendant company's right of way as aforesaid and would not have been killed. The amendment to the Railway Act, sec. 254, above quoted, gives the company no right to leave up said cattle-guards in winter without permission on application to the Railway Board, but the said guards must be erected and maintained at all times unless said Railway Board permit otherwise. The defendants failed to maintain said cattle-guards and to perform a statutory duty and became liable to a penalty under sec. 427 of said Railway Act. I find that in so acting the said company were guilty of contributory negligence.

Question 4. The proximate cause resulting in the death of said animals was the failure to maintain cattle-guards. The horses were killed on the right of way, because the cattle-guards were removed and thus access to said right of way became an easy matter, as there was no obstruction nor anything to prevent the animals from so trespassing. The said cattle-guards were down during certain months of the year to prevent just such an occurrence as the one in question, namely, to keep animals off the company's right of way. Lars K. Sevick testified that he authorized the section foreman to take up and lay down the said cattle-guards. The removal was solely by his instruction and no permission from the Railway Board was ever obtained.

The counsel for the defendant company cited as an authority in support of the defence, the case of Sporle v. Grand Trunk Pacific Railway, 28 W. L. R. 271. In this Alberta case Mr. Justice Stuart delivers the judgment of the appeal court and relies largely upon the reasoning of Mr. Justice Perdue in Clayton v. C. N. R., 17 Man. L. R. 435, also in 7 W. L. R. 721. In that case the law is laid down that liability cannot be made out under sec. 254, sub-sec. 3, and sec. 427 and sub-sec. 2, by shewing that cattle-guards at a highway crossing where cattle got onto the track were defective. Where the plaintiff's horse got on the highway because of the plaintiff's negligence in not keeping up his fences and being frightened by a train and then was killed by a train, the defendant company was held not to be responsible.

That case of Clayton v. C. N. R. and the judgment of Mr. Justice Perdue is largely varied in another Manitoba

case, Parks v. C. N. R., 15 W. L. R. 445, and on appeal 18 W. L. R. p. 118, 120, 121. The judgment in the latter case would indicate that the failure to fulfil a statutory duty is a ground for action and both sections of the law, namely, 254 and 427 and 294 are separate and distinct.

Even were I to find negligence on the part of the plaintiffs, which I do not under the evidence, I would be inclined to the view that the burden of liability would rest upon that party guilty of contributory negligence, whose said negligence was the proximate cause which brought about the death of said animals.

Mr. Justice Johnstone in Bird v. Can. Pac. Ry. Co., I. Sask. L. R., 280, says: "As to the question, did the injury arise from the defective state of the crossing, as the proximate cause, or was the proximate cause the action of the horses? I think the answer to this question should be the proximate cause of the damage as against the defendants was the defective state of the approaches on the crossing." The learned judge cited the case of Toms v. Township of Whitby, 35 U. C. R. 195, and in appeal, 37 U. C. R. 100, as an authority in favour of this proposition. Wilson, J., at p. 219 of the said judgment after a lengthy review of cases expressed in his conclusion in the words: "The defendants, I think, are directly liable for the injuries done because it did happen by reason of the defective state of the road, and that was the direct, immediate, and proximate cause of the damage."

In Underhill on Torts, 7th Can. ed., I read at p. 302: "A plaintiff's own negligence which contributed to the injury does not defeat his right of action if the defendants might or could by exercise of ordinary care have avoided it." Again on p. 303: "Where a railway train in approaching a crossing neglects to give the proper signals the company will not be relieved from liability because the person whose cattle were run over did not take the best means of avoiding the accident and because his horses were unmanageable." Tyson v. G. T. Ry. Co., 20 U. C. R. 256.

In Bender v. Canadian Southern Ry. Co., 37 U. C. R. 39. Judge Wilson says: "We do not feel satisfied they were right in holding the plaintiff free from some blame, but however that may be, he would not be disqualified from recovering, if notwithstanding any failure upon his part the defendants

could, by exercise of reasonable care upon his part, have avoided the injury which is complained of."

Mr. Livingston, counsel for the plaintiffs, submitted to me a number of other cases, and among them were Stitt v. C. N. R., 23 W. L. R. 641; Clare v. C. N. R., 17 W. L. R. 536; McLeod v. C. N. R., 9 C. R. C. 39.

The cases I have referred to seem to me to supply all the necessary authority for my judgment and I see nothing to be gained by elaborating any further on the law. In view of all the evidence submitted and all the questions of law as I decided them, I must find that the defendants are liable for the loss sustained by the said plaintiffs, and I assess the damages at the value fixed by the witness Topott.

There will be judgment for the plaintiff Early for $275 and costs; and there will be judgment for the plaintiff Hodgson for $150 and costs.

There will be counsel fee in each case of $25.

The appeal was heard by HAULTAIN, C.J., NEWLANDS and McKAY, JJ.

J. N. Fish, K.C., for plaintiffs, appellants.

P. H. Gordon, for defendants, respondents.

HAULTAIN, C.J.:—I do not think that the facts of this case come within the provisions of the first three sub-sections of sec. 294 of the Railway Act. Those sub-sections deal exclusively with the case of animals killed or injured at the point of intersection of a highway with a railway. The animals in question in this case were killed on the property of the railway company at a considerable distance from the point of intersection. The case clearly comes within sub-sections 4 and 5 of sec. 294, the provisions of which are as follows:—

"When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company, and by reason thereof damage is caused to or by such animal, the party suffering such damage shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such damage against the company in any action in any court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal

or his agent; Provided, however, that nothing herein shall be taken or construed as relieving any person from the penalties imposed by sec. 407 of this Act. (New sub-sec. 4 as enacted by sec. 8, of ch. 50, of the Statutes of 1910.)

"5. The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the property of the company, and not at the point of intersection with the highway, deprive the owner of his right to recover."

In order to successfully resist the plaintiff's claim the defendant company must establish that the animals which got upon its property and were killed" got at large through the negligence "or wilful act or omission of the owner or his agent or of the custodian of such animal or his agent."

It is admitted by the plaintiff that his horses were running at large from the 11th March up to the 18th March, 1913, the day of the accident. During the earlier part of the year the horses had been kept in an enclosed pasture, but on and after the 11th March they were allowed by the plaintiff to run at large "when," as he says, "the herd law ceased." The plaintiff was called as a witness on behalf of the defendant and on cross-examination by his own counsel made the following statement, "There was a by-law of the rural municipality of Wilton permitting animals to run at large . . . after March 11th, and I turned them out."

The reference in this and other evidence of a similar nature is undoubtedly to a by-law permitting animals to run at large during a certain portion of the year, which the municipality had the power to make under the "Rural Municipality Act." Objection was taken to the evidence given with regard to existence of a by-law and in view of that objection I do not think that we can assume that any such by-law was passed.

Under these circumstances, then, was the plaintiff's act of turning the horses out negligence or a wilful act or omission on his part? In my opinion it was a wilful act because it was done deliberately and intentionally. It might also be called a wilful omission because the plaintiff deliberately omitted to do what in the absence of a by-law, he should have done, that is, keep his horses from running at large. See Murray v. C. P. R., 7 W. L. R. 50; Becker v. C. P. R., 5 W. L. R. 570. The case of Greenlaw v. C. N. Ry. Co., 24 W. L. R. 512, was cited on behalf of the respondent, but in that

case there was a by-law permitting the running at large of cattle at all times of the year and presumably that by-law was properly proved. On the facts of that case I would respectfully agree with the interpretation given to the words "wilful act or omission." But here we have no such by-law proved and the presumption must be against the right to allow animals to run at large.

But, the respondent says, if I was guilty of negligence or a wilful act or commission, the real, direct and effective cause of the accident was the failure of the defendant company to maintain cattle-guards suitable and sufficient to prevent cattle and other animals from getting on the railway, as required by sec. 254 of the Railway Act.

The evidence shews that the cattle-guards at the point where these horses got on the railway had been removed for the winter and had not been replaced at the time of the accident and there is no suggestion that the defendant company had been relieved by the Board of Railway Commissioners from the duty of maintaining these cattle-guards under sub-sec. 4 of sec. 254 as amended by sec. 9 of ch. 22 of the Statutes of 1911.

Sec. 427 provides a penalty for the omission on the part of a railway company to do anything required by the Act by the company where no other penalty is specially provided in the Act. Sub-sec. 2 of that section further enacts that the company in addition to such penalty shall be liable to any person injured by any such omission for the full amount of damages sustained thereby. This section, in my opinion, does not apply to the present case. Sec. 294 of the Railway Act very largely extends the common law liability of a railway company for injuries to animals which get upon the property of the company and provides a special defence against actions brought in respect of such injuries. In the language of Perdue, J., in Clayton v. Can. Northern Ry. Co., 17 Man. L. R. at p. 435, cited with approval in Sporle v. G. T. P. Ry. Co., 28 W. L. R. 271, "the section provides the whole remedy to which the owner shall be entitled in such a case and the circumstances under which he can recover. . . . The rights and liabilities of the railway company in respect of animals at large are declared by sec. 237 (now 294) and no section of general application contained in the Act should add to or interfere with the specific provisions contained in the section specially framed to deal with it." The

plaintiff cannot be allowed to invoke the general principle of the common law to cure his contributory negligence in the face of a specific enactment making that contributory negligence an absolute defence to his action.

The appeal, therefore, should be allowed with costs..

NEWLANDS, J.:—The facts in this case are not disputed. The plaintiff turned out certain horses of his and allowed them to run at large without being under the charge of any person. These horses strayed upon the defendants' railroad at the intersection of the railroad with a highway, there being no cattle-guard to prevent them from going on the railroad at such point of intersection. The horses were killed upon the railroad by defendants' train and plaintiff brought this action for their value.

Sub-secs. 4 and 5 of sec. 294 of the "Railway Act" are as follows:—

"When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent.

"5. The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the property of the company, and not at the point of intersection with the highway, deprive the owner of his right to recover."

It is not alleged that there was any negligence on the part of the plaintiff in turning these horses out but Mr. Fish, K.C., on behalf of the defendants contends that they were at large through the "wilful act of the owner." The plaintiff in his evidence stated that "there was a by-law which was passed permitting animals to run at large after March 11th and I turned them out."

In construing the word "wilful" in connection with the term "wilful default," Bowen, L.J., in In re Young and Harston's contract, 31 Ch. D. 168 at p. 174 says:—

"The other word which it is sought to define is "wilful." That is a word of familiar use in every branch of law and although in some branches of the law it may have a special meaning, it generally as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he was doing and intends to do what he is doing and is a free agent."

If I adopt this meaning of the word "wilful" and I see no reason why I should not do so, as the act under discussion refers to civil rights and not to criminal offences where I can understand that the word would have the sinister meaning put upon it by Wurtele, J., in Ex parte O'Shaughnessy, 8 Can. C. C. 136 at p. 139, then I must hold that the horses in this case were at large through the wilful act of the owner and the defendants would not therefore be liable under sub-sec. 4 of sec. 294 of the Railway Act for killing these animals.

It was pointed out at the argument that sec. 294 only forbids animals to be at large within half a mile of the intersection of the railroad with a highway and that there was no evidence in this case as to what distance from such intersection the animals were when they were let go at large. This does not, in my opinion, affect the defendants' liability, because the evidence shews that they were at large within such distance from the crossing when they strayed upon the railroad and thus brought themselves within the prohibition of sec. 294, and the plaintiff having turned them at large by his wilful act must be said to have permitted them to stray at their pleasure and therefore it would be with his permission that they strayed within the prohibited distance from the intersection of the railroad and the highway.

Nor would the fact that defendants had no cattle-guards at this crossing entitle plaintiff to recover. This duty is imposed upon the company by sec. 254 of the Railway Act and they may be liable to a penalty for not complying with the Act but I do not think it affects their liability to the owners of animals trespassing on their property. The horses in question were trespassing at the time they were killed and the defendants' only liability in such a case is under sub-sec. 4 of sec. 294 of the Railway Act and as they have brought this

case within the exceptions contained in that sub-section they are not liable.

The appeal should therefore be allowed with costs.

McKay, J., concurred with Haultain, C.J.

Appeal allowed.

SASKATCHEWAN.

March 20th, 1915.

SUPREME COURT EN BANC.

Re OSTANDER ESTATE.

Private International Law—Will—Movables—Lex Domicilii—Immovables—Lex loci rei sitae—Testator Making no Provision for Wife—Application for Relief—Devolution of Estates Act—Jurisdiction of Judge in Chambers.

A judge in chambers has jurisdiction to entertain an application made by a widow for relief under the provisions of the statutes of 1910-11, ch. 13, secs. 11a to 11g, being an Act to Amend the Devolution of Estates Act.

Movables situated in Saskatchewan disposed of by the will of a person domiciled in Alberta at the time of his death are not subject to the laws of the Province of Saskatchewan and cannot be taken into consideration on an application by a widow for relief under the Devolution of Estates Act where her husband disposed of all his property, making no provision for her.

Where a testator domiciled in Alberta at the time of his death disposes of all his property, including immovables in both Alberta and Saskatchewan, making no provision for his widow, the courts of Saskatchewan may entertain an application by the widow for relief under the Devolution of Estates Act with regard to the immovables situated within that province.

An appeal from the judgment of Newlands, J., in Chambers, refusing to entertain an application by a widow for relief under the Devolution of Estates Act, (as amended by Statutes of 1910-11, ch. 13), her husband having disposed of all his property by will, making no provision for her.

The appeal was heard by Haultain, C.J., Brown, Elwood and McKay, JJ.

H. D. Pickett, for applicant, appellant.

J. N. Fish, K.C., and Ferguson, for respondent.

The judgment of the court was delivered by

HAULTAIN, C.J.:—James Ostrander died in Banff, in the province of Alberta, on the 20th February, 1914.

At the time of his death he had a fixed place of abode at Banff. By his will, dated the 7th May, 1913, he appointed Edward N. Hopkins of Moose Jaw, in the province of Saskatchewan, and William H. Ostrander of Dereham, in the province of Ontario, executors of the said will. By his will the testator disposed of a large amount of property, some of it in Alberta and some of it, consisting of land and chattel property, in Saskatchewan. On the 22nd April, 1914, the will was proved and registered in the Surrogate Court of the judicial district of Moose Jaw and letters probate were granted to the above named executors. By his will the testator disposed of the whole of his property and made no provision of any kind for his widow.

The widow accordingly applied for relief under the provisions of "An Act to amend the Devolution of Estates Act" (Ch. 13 of the Statutes of 1910-11).

Secs. 11a. to 11g. of that Act are as follows:—

"11a. The widow of a man who dies leaving a will by the terms of which his said widow would in the opinion of the judge before whom the application is made receive less than if he had died intestate leaving a widow and children may apply to the supreme court for relief.

"11b. The application may be made by notice of motion in the matter of the estate of the deceased.

"11c. The notice of motion shall be served upon the executors named in the will or upon any person to whom a grant of letters of administration with will annexed has been made six clear days before the motion is returnable.

"11d. The court may direct any other person to be served with notice of the application and the practice and procedure of the supreme court upon applications in chambers shall so far as the same are found to be applicable apply to proceedings under secs. 11a to 11k, both inclusive, of this Act, save as herein otherwise provided.

"11e. The application shall be supported by an affidavit of the applicant setting forth fully all the facts entitling her to relief under secs. 11a to 11k inclusive of this Act.

"11f. The court may direct such other evidence to be given in addition to the evidence adduced by the parties to

the application and in such manner as shall seem necessary or proper.

"11g. On any such application the court may make such allowance to the applicant out of the estate of her husband disposed of by will as shall in the opinion of the judge be equal to what would have gone to such widow under this Act had her deceased husband died intestate leaving a widow and children."

The application was made by notice of motion to a judge in Chambers, and was refused by my brother Newlands on the ground that it should have been made to the court presided over by a single judge and not to a judge in chambers.

There can be no doubt from the language of secs. 11a. and 11g. that the application should be made to a judge and not to the court en banc, and the Supreme Court is only mentioned in 11a. to indicate the forum. Sec. 11d. provides that the practice and procedure of the Supreme Court in Chambers shall, so far as it is applicable, apply to these proceedings.

Sec. 11a, however, provides that the application shall be made to a judge and sec. 11d. prescribes the practice and procedure.

Sec. 14 of the Judicature Act (Ch. 52, R. S. S.) provides as follows:—

"The jurisdiction of the Supreme Court shall be exercised so far as regards the procedure and practice therein in the manner provided by this Act and the rules of court in force in Saskatchewan or in the manner provided by rules of court made from time to time under the authority of this Act and where no special provision is contained in this Act or the said rules it shall be exercised as nearly as may be as it was exercised in the Supreme Court of Judicature in England as it existed on the 1st day of January, 1898."

In England, by the Statutes 11 George IV. and 1 William IV., every judge of the Courts of Queen's Bench, Common Pleas and Exchequer was authorized "to transact such business at Chambers or elsewhere depending on any of the said courts as relates to matters over which the said courts have a common jurisdiction and as may be according to the course and practice of the court transacted by a single judge."

Reading that enactment together with 1 and 2 Vict. ch. 45, sec. 1, the effect was to provide that every judge of the said courts sitting at Chambers had power to deal with any

matter which, by statute or otherwise might be dealt with by a judge of any of those courts in particular.

Before the Supreme Court of Judicature Act, 1873, "the general rule with regard to jurisdiction acquired by statute is stated in Smeeton v. Collier (1847), 17 L. R. Ex. 17, 1 Ex. 457, to be that where a statute in general terms and without any special limitation either express or to be inferred from its terms, gives any power to one of the superior courts, that power may be exercised by a judge at Chambers as the delegate of the court and it is only in cases of special limitation or where the statute contains expressions from which it may be inferred that the application was intended to be made in open court that the judge in chambers has no jurisdiction. This rule of construction is still applied." Archibald & Vizard's Practice p. 1, cited in the Annual Practice 195, p. 975.

In the case of Clover v. Adams (1881), 6 Q. B. D. 622, Lindley, J., at p. 625, says: "the judge at Chambers has power to act for the court generally unless there are any words to deprive him of it, and here there is nothing to oust his jurisdiction." [Reference to Jackson v. Randall (1874), 24 U. C. C. P. 87; Salm Kyrburg v. Posnanski (1884), 13 Q. B. D. 218; Ainstell v. Lesser (1885), 16 Q. B. D. 187.]

The last two cases dealt with the construction of sec. 39 of the Supreme Court of Judicature Act, 1873, which mutatis mutandis corresponds to sec. 18 of our own Judicature Act:

"18. Any judge of the Supreme Court may subject to any rules of court exercise in court or in chambers all or any part of the jurisdiction by this Act vested in the Supreme Court in all such cases and matters and in all such proceedings in any causes or matters as in England before the passing of the Supreme Court of Judicature Act 1873, might have been heard in court or in chambers respectively by a single judge of any of the courts specified in sec. 13 hereof and whose jurisdiction was thereby transferred to the high court or as may be directed or authorised to be so heard by any rules of court; in all such cases any judge sitting in court shall be deemed to constitute a court.

(2) Subject to any statute prohibiting or restricting proceedings by way of certiorari a single judge shall in addition to his other powers have all the powers of the court as to proceedings by way of certiorari over the proceedings, orders, convictions and adjudications had, taken and made by jus-

tices of the peace and police magistrates and in addition thereto shall have the power of revising, amending, modifying or otherwise dealing with the same."

A consideration of the foregoing authorities convinces me that a judge in chambers has jurisdiction to hear the application in question.

The fact that the testator had his domicile in Alberta at the time of his death and the further fact that his will disposes of real and personal property in Alberta and Saskatchewan raises two important questions.

(1) Has this court any jurisdiction in the matter at all?

(2) If it has jurisdiction, what property is subject to that jurisdiction?

As regards movables:—

(1) "The courts of the domicil are, primarily, the proper courts to determine who is entitled to the movables of the deceased (whether he died testate or intestate) and where these courts have pronounced, the English courts must follow them without investigating the grounds of their decision or receiving further evidence of its validity.

(2) "Where the courts of the domicil have not pronounced the English courts must decide for themselves on such evidence as they think proper what the law of the domicil is, i.e., whom the courts of the domicil would have declared to have been entitled to the property (whether under a will or on an intestacy) if they had been called upon to decide the question. In arriving at a decision the English court must consider itself to be a court sitting in the country where the deceased died domiciled and it must deal with the question as such a court would have dealt with it." 6 Hals. 221, 222. See also Dicey's Conflict of Laws (2nd. ed.), pp. 667-672, and cases cited by both authors.

As regards immovables: "the validity of a will of immovables is determined in every respect whether as regards capacity, form or material validity by the lex loci rei sitae." 6 Hals. 219, and cases cited therein.

"The general principle of the common law is that the laws of the place where immovable property is situate exclusively govern in respect to the rights of the parties, the modes of transfer and the solemnities which accompany them. The common law has avoided all difficulties by a simple and uniform test. It declares that the law of the situs shall exclu-

sively govern in regard to all rights, interests and titles in and to immovable property." Story, 466.

This statement of the general principle by Story is said by Dicey in the 2nd edition of the Conflict of Laws, at p. 500 to be "beyond dispute and applicable to rights of every description."

[Reference to Attorney-General v. Mill (1831), 2 Dow & Clark. 393 H. L.; Freke v. Carbery (1873), L. R. 18 Eq. 461; In Goods in Gentili (1875), Ir. Rep. 9 Eq. 541; Duncan v. Lawson, [1889] 41 Ch. D. 394; In re Piercy, Whitehaven v. Piercy, [1895] 1 Ch. 83; In re Moses, Moses v. Valentine, [1908] 2 Ch. 235.]

Following the principles stated above, I arrived at the conclusion that the movables in Saskatchewan disposed of by the will in question are not subject to the law of this province and cannot be taken into consideration on an application for relief under the Devolution of Estates Act.

Has then the widow any right to relief as respects the immovables in this province?

The fact that sec. 21 of the Devolution of Estates Act provides that land in Saskatchewan shall descend to the personal representative of the deceased owner and be distributed as if it were personal estate does not, in my opinion, make the land "personal estate," or in any way affect the general principle with regard to immovables. The section merely prescribes the mode in which land shall descend in Saskatchewan and provides how it shall be distributed in the event of intestacy. Land still remains land until it is sold and the proceeds are available for distribution, and being land it must be dealt with and be subject in every way to the lex situs. Byrne v. Colclough, 1 K. & J. 124.

[Reference also to In re Rea, Rea v. Rea (1902), 1 Ir. R. 451; Hanson v. Walker (1829), 7 L. J. (O.S.) Ch. 135; Re Peats Trusts (1869), L. R. 7 Eq. 302; Grimwood v. Bartels (1877), 46 L. J. Ch. 788.]

I think that it must be taken for granted that the statute only affects to deal with and can only deal with property within the jurisdiction of the legislature and that the allowance the widow may be entitled to is the amount which would have come to her on intestacy under the Saskatchewan Devolution of Estates Act.

If a man domiciled in Saskatchewan died intestate leaving a widow and children, the widow is entitled to one-third

of his entire estate within the province. And on the principle above stated she would also be entitled to one-third of his personal estate wherever situate. Any real estate outside of the province will, as is stated above, follow the law of succession of the country in which it is situate.

Under the Devolution of Estates Act, a widow under certain circumstances may be awarded an allowance which bears a certain proportion to the total estate. That proportion and that estate must be determined, as I have already pointed out, by the laws of the province in which the relief is sought. Sec. 11h. provides for that relief taking the form of a conveyance of property by way of allowance and that, of course, can only be ordered under the lex loci rei sitae.

There is, I believe, in Alberta an Act similar to the one under consideration. Unfortunately the applicant in this case did not make a similar application to the Alberta court. If she had, that court could only have awarded her her proportion of the whole personal estate and of such portion of the real estate as is situate in Alberta. The Alberta court could not in any way deal with land in Saskatchewan, on the principle already mentioned, that the validity of a will of immovables is determined in every respect as regards capacity, form or material validity by the lex loci rei sitae.

Why then should the applicant not be entitled to come to this court and ask for the statutory relief in respect of that portion of the husband's property which is subject to the laws of this province alone? I am of opinion that she has that right and that, to the extent of the property amenable to our law, she is entitled to the relief provided for in the Act.

Unfortunately the amount of the property is small in comparison to the total estate disposed of by the will.

In my opinion, therefore, this appeal should be allowed.

The material at our disposal is not sufficient to enable us to fix the allowance and the matter should therefore be brought up again in chambers for that purpose, when the chamber judge can determine what, if any, further evidence may be necessary for the purpose.

The respondent will pay the applicant's costs of this appeal.

Appeal allowed.

ALBERTA.

IVES, J. MARCH 25TH, 1915.

TRIAL.

NORTH WEST THEATRE CO. LTD. v. McKINNON.

Landlord and Tenant—Assignment by Tenant for Benefit of Creditors—Assignee Entering Into Possession Without Disclaiming Lease — Personal Judgment Against Assignee.

Where an assignee of an insolvent acts under his deed of assignment and enters into possession of premises, held by the insolvent under a lease, without clearly disclaiming the lease, he thereby accepts the lease and becomes personally bound by its covenants. *White* v. *Hunt*, L. R. 6 Ex. p. 32; *Hanson* v. *Stevenson and Milns*, 106 E. R. at p. 113; *Rendall* v. *Andrews et al.*, 61 L. J. Q. B. D. p. 630: referred to.

An action by a landlord to recover from the defendant, as assignee of the tenant of said landlord, a loss of $995 arising from the difference in rent of premises for the unexpired term of a lease taken by the said tenant, an insolvent.

O. M. Biggar, K.C., for plaintiff.

J. F. Lymburn, for defendant.

IVES, J.:—The facts are these:—

The plaintiff, by a writing dated the 12th November, 1913, let and demised to one McLachlan certain premises in the city of Edmonton for a term of two years, computed from the 15th November, 1913, at a rent reserved payable in monthly instalments of $200.

McLachlan went into possession and conducted his business there until the 31st day of August, 1914, at which date he executed an assignment to the defendant for the benefit of his creditors, under the provisions of the Assignments Act. The defendant is an official assignee under that Act.

The defendant took possession of the estate—stock in trade of jewelry, etc.—in the premises and entered into possession of the premises on the 1st of September.

On the morning of September 3rd defendant had a conversation with the landlord's solicitors, who were threatening distraint for rent and defendant says that he then assured

them that he would see to the rent while he was there if they would refrain from distraint. On the same day their solicitors—Messrs. Griesbach, O'Connor & Co.—wrote defendant referring to the morning conversation, and said that if he would undertake the rent as assignee they would not go to the expense or formality of distraint on behalf of the lessor. On September 5th the defendant writes to the solicitors guaranteeing the rent of the premises as long as he occupies them. On the 6th November the defendant forwards to the solicitors of the lessor his cheque for $600 in payment of rent for September, October and November. This payment is acknowledged by the solicitors in their letter to the defendant dated 2nd December and they further say in this letter: "As arranged the acceptance of this cheque is not to prejudice our rights in any way under the lease, nor shall it operate to any extent as evidence of a monthly tenancy."

To this letter defendant replies on the 4th December and the 2nd paragraph reads, "I am not going to be responsible for any further rent in connection with the McLachlan estate, so I will be glad to have you take any steps that you think necessary to protect your interests."

At the end of September the defendant had sold the assets of the insolvent.

On the 2nd day of January, 1915, the plaintiff, lessors, let the premises for a year at a monthly rental of $110 after a consultation with defendant who says that he advised that the proposed new lease was a good one, considering the times and conditions.

Upon this state of facts the plaintiff asks for a personal judgment against the defendant.

I think the law is perfectly clear that such judgment should go. Where an assignee of an insolvent acts under his deed of assignment and enters into possession of the premises, held by the insolvent under lease, without clearly disclaiming the lease, he accepts the lease and becomes personally bound by its covenants. I am not so sure of his liability if he does not enter into possession and it may be that in such case no disclaimer would be required. In the present case, however, the defendant entered into possession and made no disclaimer until in his letter of the 4th December—two months later—and manifestly he could not then shed a liability which he had assumed.

The case of White v. Hunt, L. R. 6 Ex. p. 32 is very clear and in point.

The authorities urged by the defendant, namely, Hanson v. Stevenson and Milns, 106 E. R. at p. 113, and Rendall v. Andrew et al. in 61 L. J. Q. B. D. p. 630, are clearly to the same effect.

There will be judgment for plaintiff for $995 and costs, and as the defendant was acting with the approval of the inspectors, a direction that the amount be paid out of the funds in defendant's hands as assignee of C. R. McLachlan to the extent of such funds.

BRITISH COLUMBIA.

MACDONALD, J. FEBRUARY 15TH, 1915.

TRIAL.

MARRIOTT v. MARTIN.

Solicitor — Professional Negligence — Purchase of Crown Land — Timber Lands — Failure of Solicitor to Advise Client as to Liability of Refusal of Title by Crown — Land Act (sec. 39.)—Damages.

Where a client acting upon the advice of his solicitor, purchases land, the title to which is subsequently refused by the Crown on the ground that it is "timber land" within the meaning of sec. 39 of the Land Act, the client, in order to recover damages from the solicitor for professional negligence for the failure to consider and advise him as to the danger of the purchase being refused by the Crown, must shew not merely an error of judgment on the part of the solicitor, but the want of professional care and skill to such an extent as to render the solicitor liable for gross negligence.

A client who has suffered damage from the professional negligence of his solicitor, is entitled to be placed in the same position as if the solicitor had done his duty.

An action brought by a client against a solicitor to recover damages for loss occasioned by the alleged professional negligence of the said solicitor.

G. H. Dorrell and Donald Smith, for plaintiff.

Maclean, K.C., for defendant.

MACDONALD, J.:—Plaintiff seeks to recover damages from the defendant on the ground that the defendant while acting as his solicitor was negligent and that loss resulted to the

plaintiff therefrom. Plaintiff agreed to buy an undivided one-third interest in 516 acres of land at Quatsino, B.C., from one George Shone, and by letter of the 6th August, 1912, instructed the defendant to act for him in the matter. Plaintiff is a retired English solicitor, but not being familiar with the laws of this province he thought it advisable to employ a local solicitor. Before the letter referred to had been acted upon, he met defendant in his office at Victoria and a discussion took place upon the question of the title that could be obtained to the land proposed to be purchased. The parties do not differ to any great extent as to what occurred, except that the plaintiff states that at this consultation the defendant informed him that there was no practical risk to run as to the title and that it was only a theoretical risk. Defendant denies this portion of the conversation: although plaintiff was firmly convinced as to his recollection in this respect being correct, I am inclined to think he is honestly mistaken. I am led to this conclusion by the fact that plaintiff, when giving instructions as to a second purchase of land on the 18th October, 1912, referred to the title to a further interest in the same property as follows:—

"I presume there is no practical risk so far as title is concerned, is there?"

If he had already discussed the matter with his solicitor he would have put the query in a different manner and likely have referred to the previous conversation. However, I do not think this point material. There is no dispute between the parties as to the remainder of the conversation at the meeting in August. Plaintiff admits that defendant explained to him that he could not get title to the land he was purchasing until the Crown Grant issued: that it was within the power of the Crown not to issue a grant at its discretion; the Crown could so act with or without sufficient reason. Defendant informed the plaintiff that it was not unusual for people to deal with land in the way proposed and that he himself had made similar purchases. Discussion then took place as to the timber and the defendant was fully aware that the plaintiff was laying stress upon the fact that the timber on the land was valuable, but the matter of rejection on the part of the Crown on account of excess of timber was not discussed. The necessary documents were prepared, and, after examination of the certificates of purchase and a correction in the powers of attorney, defendant saw no reason

why the transaction should not be put through and the money paid over in the terms of the agreement. The survey had been made at the time. A cheque for $2,013.17 was issued by the plaintiff in favour of the defendant and this amount paid over to the vendor. On the 18th October, 1912, plaintiff agreed to buy another one-third interest in the Quatsino land from one Knight and instructed the defendant to put through the matter for him, adding in his letter the query as to title. Defendant acknowledged receipt of the letter of instructions on the 21st October, 1912, and stated to the plaintiff that he would find out if the parties had completed their payments to the Government and whether the powers of attorney were then in good order, adding, there is no practical risk, in my opinion, and the way in which the transaction with Mr. Shone was carried through is the only possible way of buying land where the Crown grant has not yet issued. On November 6th, 1912, defendant wrote the plaintiff that the documents appeared to be all in order so that Shone and Knight might now be paid the amounts due as arranged. The purchase from Knight was thus completed in a similar manner to the previous purchase from Shone, and on November 8th, 1912, plaintiff paid the agents for Knight and Shone $3,321.17. The total payments made by the plaintiff in respect of these purchases were the said sum of $2,013.17 paid to the defendant and the sum of $2,667.17 paid to Knight and the sum of $654, paid directly to Shone—in all amounting to $5,334.34. This amount plaintiff seeks to recover from the defendant, together with interest.

Plaintiff complains that, the matter of timber on the land being brought to the attention of the defendant, he should have warned him as to the danger of completing the purchase before it was determined that the land being sought to be purchased from the Crown was not "timber lands" within the meaning of the Land Act, or, in the alternative, that the defendant was neglectful of his duty in not pointing out the fact that "timber lands" could not be sold. It is presumed that the defendant had full knowledge of the statutes dealing with the sale of Crown lands and the question is whether he was negligent in completing the purchases.

It is contended that defendant is only liable for gross negligence. In Schoen v. Macdonell, 18 W. L. R. p. 329, the defendants were held liable, and Mr. Justice Galliher in his judgment, refers to the neglect of the solicitors to procure

certain timber licenses resulting in loss to the plaintiffs as "a case of gross carelessness" on the part of Jones, one of the partners, and all the defendants were held liable. It is difficult to determine what is gross negligence on the part of a solicitor. Mr. Justice Denman in Whiteman v. Hawkins, 4 C. P. D. (1878), 13 at p. 19, in referring to the judgment of the county court judge deciding that the defendant was not liable as a solicitor, states:—

"If his judgment turned upon any supposed distinction between different degrees of negligence—if he thought that, to render the defendant liable to substantial damages, it was necessary to establish gross negligence as contradistinguished from want of due care and attention to his business as a solicitor—I think he was wrong."

In Nocton v. Ashburton, (Lord), [1914] A. C. 932, at p. 956, Lord Haldane does not refer to different degrees of negligence on the part of a solicitor acting for his client. "The solicitor contracts with his client to be skilful and careful." And at p. 958, reference is made to the solicitor being liable for a breach of the implied contract to exercise due care and skill. In Faithful v. Kestaven, 103 L. T. R. p. 56, an action was brought by a solicitor for costs and the wife of the defendant counterclaimed to recover damages for alleged negligence on the part of the plaintiff in giving wrong advice and in omitting to give good advice to her. Degrees of negligence as applied to a solicitor seem to have been fully recognized, and Farwell, L.J., said:—

"On the whole I have come to the conclusion that there is not enough negligence to amount to that crassa negligentia necessary to support an action against a solicitor and that this appeal fails."

In the same case reference is made to the judgment of Lord Denman, C.J., in Hunter v. Caldwell, 10 Ad. & Ell. (N.S.) 69, at pp. 81-2 as follows:—

"It was the province of the judge to inform the jury for what species or degree of negligence an attorney was properly answerable, and what duty in the case before them was cast upon him either by the statute or the practice of the court: but, having done this, it was right to leave them to say, considering all the circumstances and the evidence of the practitioners, whether, in the first place, the attorney had performed his duty, and, in the second, in case of non-performance, whether the neglect was of that sort of degree which

was venial or culpable in the sense of not sustaining or sustaining an action."

The error of the plaintiff in advising the wife seems to have been treated as one of lack of judgment. Kennedy, L.J., says that something more than that is necessary in order to constitute actionable negligence and the learned trial judge was not considered to have been wrong in holding that it was not proved to his satisfaction that there was such a want of the professional care and skill required "as to make a good charge of negligence against a solicitor." Lord Brougham in Purvis v. Landell (1845), 12 Cl. & F. 91, at p. 98, in referring to an action against a solicitor for negligence says:—

"It is of the very essence of this action that there should be a negligence of a crass description, which we call crassa negligentia—that the man who has undertaken to perform the duty of an attorney . . . had so negligently discharged (his duty) as to damnify his employer or deprive him of the benefit which he had a right to expect from the services."

He refers to Lord Ellenborough's judgment in Baikie v. Chandless, 3 Camp. p. 17, to the same effect, and then adds:

"Further, the record must bring before the court a case of that kind, either by stating such facts as no man who reads it will not at once perceive, although without its being alleged in terms to be crassa negligentia—something so clear that no man can doubt of it; or, if that should not be the case, then he must use the very averment that he was crassa negligentia."

Plaintiff's pleadings herein do not allege gross negligence, so the plaintiff is driven to contend that the pleadings and evidence shew such statement of facts as to constitute gross negligence, "so that he who runs may read." Plaintiff must, in order to come within the authorities, take the position that it was not merely an error of judgment on the part of his solicitor in failing to consider and advise him as to the danger of the purchase being refused on the ground of the quantity of timber on the land, but that such failure was want of professional care and skill to such an extent as to render the defendant liable for gross negligence. It must be borne in mind that the plaintiff was purchasing property to which he was well aware he could not then obtain title. Presumably, his submission is that while he knew he could not obtain title and was willing to accept the risks attached to his purchase

which had been pointed out to him by the defendant, still he would not have accepted the further risk which he alleges should have been disclosed and from which he suffered damage. This involves consideration of the position of the parties at the time and the extent to which a solicitor is required to search and advise, where it is thus common ground between the client and himself that the title is not being passed, and that the obtaining of a complete title eventually is uncertain.

No criticism has been offered as to the form of the conveyancing approved of by the defendant. The documents contained covenants for title and other necessary safeguards. Did the defendant then under the circumstances give bad advice or fail to give good advice in connection with this purchase, and, if so, did such failure amount to actionable negligence? In the purchase of Crown lands it is provided that they are to be classified by the surveyor, who is to make full and accurate field notes of his survey, which are to be filed in the Department of Lands accompanied by a statutory declaration verifying such notes, and shewing the area of timber lands and first class or second class lands which are embraced in such survey. The distinction between first and second class lands is indicated, and then as to timber lands sec. 39 of the Land Act provides that:—

"Timber lands (that is, lands which contain milling timber of the average extent of eight thousand feet to the acre west of the Cascades and five thousand feet to the acre east of the Cascades, to each one hundred and sixty acres) shall not be open for sale."

Defendant admits that he did not search the field notes pertaining to the lands in question. He was not called as a witness on his own behalf at the trial, and, apparently, relied upon his examination for discovery (put in in its entirety by the plaintiff) together with the correspondence, including copies of the departmental files. He did not offer as an excuse for not examining these field notes that sec. 39 had no application. It was, however, argued on his behalf that the pieces of land of which he was purchasing undivided interests were not "timber lands" within the meaning of this section. Of the three pieces of land applied to be purchased from the Crown, lot 1012 has 347 acres, lot 1013 has 127 acres, and lot 1011 has 44 acres. The submission that the definition given to timber lands in the section could not be

applied, as the average extent of timber to the acre is based on "each 160 acres," has no weight when dealing with lot 1012, so that if "due care and skill" means that the field notes should be searched and, if not available, completion of the sale should be delayed until survey was made and the field notes filed with proper classification, then the defendant was negligent in the matter. I do not think, however, that the point as to basis of determining "timber lands" is well taken as to any of the pieces. The Department of Lands would at any rate be justified under the Act in refusing application to purchase where the average extent of milling timber was eight thousand feet to the acre, notwithstanding that the piece of land sought to be purchased was less than 160 acres. Were the application of the section to be otherwise, it would mean that along the irregular shore line of the province applicants might obtain by purchase at the Government price land which was less than 160 acres in area, contrary to the spirit and intention of the legislation. If this section might thus affect the lands in question, then to what extent should the defendant have advised and searched as to the likelihood of it being applied? As to the first purchase from Shone, the surveyor's notes were mailed to the Department of Lands on the 25th July, 1912, and presumably, were on file in the department until they were returned to the surveyor for correction on the 25th August, 1912. They were amended and re-filed on the 26th September, 1912, and consequently, were on file at the time when the defendant wrote the plaintiff on the 20th August, 1912, stating that he had examined the certificates of purchase and the powers of attorney, and that they were adequate and sufficient with the exception of a change being required in the description of the property giving the lot numbers "now that the survey has been made." He then added: "I do not see any reason why the transaction should not be put through in the way here provided for and am giving this letter to Mr. Shone, who states he is going up to Duncans to see you." Whether such notes were on file or not at this time, I think the solicitor should have examined all available documents that would assist in protecting his client, though the field notes, if examined, would not then have indicated any lands classified as "timber lands." It is true the plaintiff had spoken of the valuable timber on the property but that of itself might not be sufficient to suggest to the defendant the advisability of

investigating as to whether the lands were classified as timber lands or not. He might assume that the applicants for purchase were not seeking to obtain land from the Crown which was not open for sale. If a search at that time would have disclosed the fact that a portion of the land was classified as "timber land" then it was his duty not to have sanctioned completion of the purchase until the question of whether the Crown was willing to sell had been determined. It might be contended that the defendant should have made enquiries as to the classification of the lands. It is a matter of opinion but I do not think there was under the circumstances as to this piece, the want of care on the part of the defendant requisite to create liability. As to the second purchase of a one-third interest in the same land from Knight this took place at a time when the field notes had been altered and returned to the Department of Lands. If they had been searched they would have shewn that the surveyor acting for the applicants to purchase had by declarations made on the 24th September, 1912, stated in his classification of the lands that lot 1011 containing 44 acres had 20 acres of timber lands and 24 acres of second class lands, while lot 1012 containing 347 acres had 200 acres of timber lands and 147 acres of second class lands and lot 1013 containing 127 acres had 90 acres of timber lands and 37 acres of second class lands. It was thus clearly stated that lands which the surveyor classified as "timber lands" were sought to be purchased from the Crown. This would be in the face of the provision of the statute that such lands were not open for sale. Defendant should, after searching and finding this condition of affairs, have either advised his client to abandon the purchase of a further interest or at any rate to hold the matter in abeyance until the danger of refusal had been removed. It was urged that in any event, aside from the question of negligence, it was not proved that the Minister of Lands had refused to complete the sale on the ground that they were timber lands. It is true that the letter stating that this was the reason for refusal is only signed by the Deputy Minister of Lands, but I do not think such a defence is now open to the defendant. His actions subsequent to the refusal to purchase and the correspondence has estopped him from setting up such a contention. My opinion is that in the purchase of the one-third interest from Knight by agreement dated 13th October, 1912, the defendant did not exercise due "care and skill" required of him as a solicitor.

Even if the defendant be held liable for negligence, it is contended that there is no evidence to shew that the plaintiff suffered damage on this account. Plaintiff says that money was paid on the strength of the advice or lack of advice given by the defendant. None of the moneys so paid have been recovered nor has the plaintiff brought any action under the covenants contained in the agreement with Knight. It was argued on his behalf that even if any action had been brought, aside from the question of Knight being financially responsible, a question might arise as to whether a defence was not open, based upon the decisions in Brownlee v. McIntosh (1913), 5 W. W. R. 1137; 26 W. L. R. 906; and Clark v. Swan (1914), 6 W. W. R. 319; 27 W. L. R. 694. I do not consider it necessary to come to any conclusion on this point as, in my opinion, the onus of shewing that the moneys could be recovered under the agreement rests upon the defendant. There is evidence to shew that he was prepared to damnify or protect the plaintiff in any action that might be brought for such a purpose and I do not think he can now successfully contend that the plaintiff should have pursued any remedy he may possess against Knight before being entitled to call upon the defendant for payment. Mayne on Damages, 7th ed., p. 498, dealing with actions against attorneys, says:—

"A plaintiff is entitled to be placed in the same position as if the attorney had done his duty, but he is entitled to no more. However, where no diligence could have been effectual, as where the client could have had no ground of action or defence, the attorney cannot be liable for negligence unless it was caused independent of the necessary result of the suit or other proceeding. It lies upon the defendant, however, to establish this defence affirmatively, and the fact that the plaintiff has suffered no actual injury is no bar to the action being otherwise maintainable. He is entitled to nominal damages."

In Whiteman v. Hawkins, supra, the County Court Judge said:—

"The question of damages would raise a very serious difficulty even if he held that the solicitor had not been guilty of gross negligence."

It appeared that with respect to a piece of property, for which title was defective, the price obtained could not be segregated from the rest of the property disposed of. The extent of the loss that had arisen through the solicitor could

not be specifically determined. On appeal, reversing the judgment of the County Court Judge, the matter was dealt with by Denman, J., as follows:—

"I think we have abundant material before us to shew to what extent the plaintiff has been damnified by the admitted negligence of the defendant. The whole case was fully gone into and the defendant offered no evidence to shew that the plaintiff had really sustained no damage. I apprehend it to be a sound principle of law as against a wrongdoer that, if negligence is proved, in the absence of evidence on the part of the defendant to reduce the damages, the plaintiff is entitled to recover the full amount of the pecuniary loss he has sustained."

In Gould v. Blanchard, 29 N. S. R. p. 361, at 364, Townshend, J., says:—

The burden of proving negligence is primarily on the plaintiff, but, when once established, it is for the solicitor to prove that the client was not injured by it."

There should be judgment for the plaintiff for the amount paid under the Knight agreement—$2,667.17. Plaintiff is entitled to his costs of action.

THE

Western Law Reporter

VOL. XXX. TORONTO, APRIL 26, 1915. No. 18

ALBERTA.

WALSH, J. FEBRUARY 26TH, 1915.

TRIAL.

McFADDEN v. COLVILLE RANCHING CO. LTD.

Foreign Judgment—Conditional Appearance Before Foreign Tribunal—Attornment to Jurisdiction of Foreign Court.

A Dominion company with its head office in Alberta, entered a conditional appearance in Ontario, expressed to be "without prejudice to the right of defendant to dispute the jurisdiction of the court." In its statement of defence defendant, after stating that it was delivered without prejudice to its said rights, set out grounds of defence to the action on the merits. The action was tried in the presence of defendant's counsel and the plaintiff, and judgment was given for the latter:—

Held, that plaintiff was entitled to sue in Alberta upon the said judgment on the ground that defendant attorned to the jurisdiction of the foreign court and could not afterwards be heard to say that it was not bound by the judgment of the said court.

Boissière v. *Brockner & Co.*, 6 T. L. R. 85, followed.

Action by plaintiff upon a judgment recovered by him in Ontario.

I. B. Howatt, for plaintiff.

J. R. Lavell, for defendant.

WALSH, J.:—The plaintiff sues upon a judgment recovered by him against the defendant in Ontario. The only defence is that as the defendant is a Dominion company with its head office in this province, this judgment cannot be enforced against it here.

I have to deal with the facts upon verbal admissions made by counsel at the trial together with a certified copy of the proceedings in the foreign court which was put in by consent.

The defendant pursuant to leave given it by order of the judge of that court entered a conditional appearance under Rule 173 of the Ontario Rules of Court, which rule reads as follows: "A conditional appearance may be entered by leave of the court or a judge." The appearance so entered was expressed to be "without prejudice to the right of the defendant to dispute the jurisdiction of the court herein." Seven days later a statement of defence was delivered, the first paragraph of which, after reciting the above order, concludes as follows: "and the defendant delivers this, its defence, hereto pursuant to the leave aforesaid without prejudice to its said rights." Three other paragraphs appear in the statement of defence, setting out grounds of defence to the action upon the merits. In the following month the action came on for trial," in presence of counsel for the defendant, the plaintiff appearing in person," to quote the language of the formal judgment, when "upon hearing read the pleadings and hearing the evidence adduced and what was alleged by the plaintiff and counsel aforesaid" judgment was reserved and later was given in favour of the plaintiff.

Upon the facts before me, I am of the opinion that the defendant attorned to the jurisdiction of the foreign court and cannot now be heard to say that it is not bound by its judgment. The conditional appearance was entered no doubt for the purpose of preserving to the defendant the right to object to the jurisdiction of the foreign court, a right which might have been lost to it by an unconditional appearance or an appearance not under protest. The defendant, however, did not content itself with this effort to prevent the recovery of a judgment against it. It placed upon the record allegations of fact, which, if true, would have effectually met the plaintiff's claim on the merits. It went to trial on the issues thus raised upon the pleadings and it was represented by counsel at the trial. In what it did subsequent to the entry of its appearance, I think that it invited the foreign tribunal to dispose of the matters in issue between it and the plaintiff in the event of its plea to the jurisdiction failing and having done so, it cannot now escape the legal obligation to pay the plaintiff's claim imposed upon it by the judgment of that court.

The judgment of Cave, J., in Boissière v. Brockner and Co., 6 T. L. R. 85, seems to cover the case completely.

There will be judgment for the plaintiff with costs.

EXCHEQUER COURT OF CANADA.

(BRITISH COLUMBIA ADMIRALTY DISTRICT.)

MARTIN, LOC.J.ADM. DECEMBER 23RD, 1915.

TRIAL.

THE HUMBOLDT v. THE ESCORT.

Ship — Salvage Services — Vessel Not Abandoned — "Derelict."

A vessel can not be derelict before abandonment; derelict is a term applied to a thing abandoned and deserted at sea by those in charge of it without hope on their part of recovering it and without any intention of returning to it.

A claim for salvage services.

G. B. MacNeill, K.C., for plaintiff.

Alexander, for defendant.

MARTIN, LOC.J.ADM.:—This is a claim for salvage services rendered to the tug Escort No. 2 (137.37 tons gross) which on the 22nd November, 1913, had become disabled owing to her propeller being broken, and had got into such a position (a little to the south-east of Hannah Bank, in the Sea Otter Group, Smith Sound) that she would, beyond any reasonable doubt in the state of the wind and tide, have become a total wreck within a very short time, had not the S.S. Humboldt come to her assistance at 1.15 p.m., in response to her danger signals. The Humboldt finally took her in tow at 2.20 after about an hour's manoeuvering which placed the Humboldt in a position of peril to an appreciable degree, because when she did make fast to the Escort and take her in tow she was between half and three-quarters of a mile from the reef. Owing to the heavy swell it was then impossible to take the master and crew (consisting of 11 souls, all told) off the Escort and they had before the arrival of the Humboldt made preparations to abandon her and take to their boat and make the somewhat hazardous attempt to reach land at Cape Calvert some 15 miles away which was the most favourable point to reach in the circumstances.

The Humboldt is a wooden steamship of 1,075 tons gross, valued at $150,000, with a crew of 46 men all told, and had

50 passengers on board and a cargo of $8,725, and gold bullion to the amount of $142,032. She towed the Escort to Alert Bay, about 50 miles distant, and the only safe port in the circumstances, at night, arriving there at 4 a.m. the following day, after being further delayed about 3 hours by fouling the hawser (which had to be cut out of the wheel) in bringing the Escort up alongside when nearing Alert Bay. In performing this service the Humboldt did not have to diverge from her regular course more than 5 miles.

A conflict arose as to the value of the Escort and much evidence was given on both sides and I have found difficulty in determining this often vexed question (as to which cf. Dunsmuir v. The Otter (1909), 18 B. C. 435; Vermont S.S. Co. v. The Abbey Palmer (1904), 8 Ex. 446; The Iron Master (1859), Swab. 441; The Harmonides (1903), Prob. 1; 9 Asp. 354; The Marpessa (1906), Prob. 14; and The Hohenzollern, Ib. 339; 76 L. J. Ad. 17), and the conclusion that I can arrive at which is nearest to my own satisfaction is to fix her value at $10,000.

It was submitted that the Escort should, in the circumstances, be considered to be a derelict as she was in a hopeless position and on the point of being abandoned by her master and crew who were about to take to their boat when succour arrived, and therefore a large award should be given, a moiety being asked for, and the cases of The Hebe (1879), 4 P. D. 217, and The Livietta (1883), 8 P. D. 24, were cited in support of the submission. But they do not assist the plaintiff because it was admitted that the respective vessels were in fact derelicts in each of these cases. I have been unable to find any authority in support of the contention that a vessel should be deemed to be a derelict before it has been abandoned. The general rule is stated in Lord Justice Kennedy's work on Civil Salvage (2nd ed. 1907), at p. 61-2, where the cases are cited:—

"'Derelict' is a term legally applied to a thing which is abandoned and deserted at sea by those who were in charge of it, without hope on their part of recovering it (sine spe recuperandi), and without intention of returning to it (sine animo revertendi.) It is in practice usually applied only to a vessel, but it might properly be used of cargo also apart from a vessel. The question whether a vessel is or is not to be adjudged a derelict is decided by ascertaining, not what was actually the state of things when she was quitted by her

master and crew, but what were their intentions and their expectations when they quitted her."

In the case at bar it is therefore clear that from no point of view could the Escort be regarded as a derelict as there was no abandonment, and therefore I shall deal with the value of the salvage services in the ordinary way and have decided to award the sum of $2,000 and the value of the damaged hawser $270, as a fair remuneration therefor, deducting, however, the amount received from the sale of the damaged hawser, said amount to be proved by the affidavit of Max Kalish, at his company's expense, pursuant to his undertaking given in that behalf. Judgment will be entered accordingly, with costs.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

FERRIE v. MEIKLE.

Sale of Goods—Unregistered Lien Note—Subsequent Purchaser for Value with Actual Notice—Note Void against Subsequent Purchaser—Act Respecting Lien Notes and Conditional Sales of Goods (R. S. S. ch. 145.)

A purchaser for value with notice of the existence of an unregistered lien is a purchaser in good faith for valuable consideration, and the effect of the Act Respecting Lien Notes and Conditional Sales of Goods is to render the lien void.

An appeal by the defendants from the trial judgment in an action for damages for the conversion of two horses by defendants.

The appeal was heard by HAULTAIN, C.J., NEWLANDS and MCKAY, JJ.

G. A. W. Braithwaite, for plaintiff, appellant.

B. D. Hogarth, for defendants, respondents.

The judgment of the court was delivered by

NEWLANDS, J.:—The defendant John Meikle took the horses in question out of the possession of the plaintiff by virtue of two lien notes, one for each horse, and he sold them

to the defendant Percy G. Meikle and at the commencement of this action they were in the possession of the latter though he sold them before the trial. The lien notes in question contained no proper description of the horses and were not registered as required by the Act respecting Lien Notes. The plaintiff at the time he or his partner bought the horses had notice of the existence of John Meikle's lien and the trial judge found that having notice of the lien he was not a purchaser in good faith within the meaning of the above Act. He cites as authority for this proposition King v. Kuhn, 4 M. R. 413. As this case was overruled by the Court of Queen's Bench in Manitoba sitting en banc in Roff v. Krecker, 8 M. R. 230, it is not now any authority for the proposition mentioned. In Roff v. Krecker, Taylor, C.J., reviews all the authorities both in England and Ontario upon statutes using similar language. At p. 239 he says: "If the mortgage was taken for a fair consideration, and not for a collusive purpose, the plaintiff is undoubtedly under the ruling of Robinson, C.J., in Moffat v. Coulson (19 U. C. R. 341), a mortgage in good faith. It was said in Vane v. Vane, W. R. 8 Ch. 399, a bona fide purchaser means 'that the purchaser should be really a purchaser and not merely a donee taking a gift under the form of a purchase.' It seems to me that under the authorities, the plaintiff being a purchaser in good faith for valuable consideration, his having had notice of the defendant's prior but unfiled mortgage is not material and he is entitled to the protection of the statute." It is not disputed in this case that the plaintiff or his partner actually bought the horses in question from Kane, to whom defendant John Meikle had sold them, and paid valuable consideration for them.

Now as plaintiff was a purchaser in good faith for valuable consideration is he protected by the Act? The Act respecting Lien Notes differs from the Act respecting Chattel Mortgages in that the latter Act makes void against the subsequent purchaser the unregistered chattel mortgage, while the former Act provides that the seller shall not be permitted to set up any such right of property or right of possession as against the purchaser unless the lien note is registered. I do not see that the different wording of these two statutes makes any material difference in their effect. The defendants in this case can only justify the taking and keeping of the horses in question under the lien notes and if they

cannot set up this defence against the plaintiff on account of the notes not being registered then they have no defence to the plaintiff's action and the effect is the same as if the statute had rendered the notes void.

I am therefore of the opinion that the plaintiff was a purchaser in good faith for valuable consideration of the horses in question and that defendants have no defence to his action.

Plaintiff is therefore entitled to recover and the appeal should therefore be allowed with costs.

As the horses have been sold by defendants, plaintiff should have judgment for their value which I would fix at $225, and in addition $25 damages, together with the costs of the trial and of the appeal.

Appeal allowed.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

RE WORRELL.

Criminal Law—Summary Trial of Indictable Offence—Unlawfully Wounding—Trial Without Consent of Accused —Consent Not Necessary—Criminal Code, secs. 773 & 777.

Held, that sec. 773 of the Criminal Code confers absolute jurisdiction upon a magistrate over the offences specified therein, and that sec. 777 applies to offences other than those mentioned in sec. 773.

Rex v. ***Hayward***, 6 Can. C. C. 399, followed.

An application for a writ of certiorari to quash the conviction of Charles Worrell by the police magistrate of the city of Regina on a charge of unlawfully wounding.

The application was heard by NEWLANDS, LAMONT, ELWOOD and MCKAY, JJ.

H. Y. McDonald, K.C., for applicant.

H. E. Sampson, for the Crown.

The judgment of the court was delivered by

NEWLANDS, J.:—The accused was tried summarily without his consent having been asked or given. This conviction was confirmed by the Chief Justice, who held that sec. 777 of the Criminal Code applied to offences other than those specified in 773, and that the words "except in cases coming within the provisions of sec. 777" in sec. 776 were intended to confine the absolute jurisdiction conferred by that section to cases enumerated in sec. 773, and to provide that the additional jurisdiction given by sec. 777 should only be exercised with the consent of the accused. For this proposition he cites King v. Hayword, 6 Can. C. C. 399.

This case was an application for a habeas corpus before Boyd, C. The accused had been tried before a police magistrate for stealing 80 cents from a church box, pleaded guilty and was sentenced to 2 years in the Provincial Reformatory. The learned judge in his judgment discharging the prisoner said:—

"The offence charged was stealing a small sum of money, much less than $10, and so it falls to be dealt with under sec. 783 of the Code.

"It was argued that it might be regarded as coming under sec. 785, and so the sentence of 2 years' imprisonment be justified. But I think the correct reading of that section is suggested by the gloss in the margin, that it is intended to comprehend summary trial 'in certain other cases' than those enumerated specifically in sec. 783. Where the offence is charged and in reality falls under sec. 783 (a), it is to be treated as a comparatively petty offence, with the extreme limit of incarceration fixed at 6 months: sec. 787. (Secs. 783, 785 and 787 are respectively 773, 777 and 780 of the Code.)

This case decides two points. First, that when the accused is summarily tried and convicted of an offence under sec. 773, there can only be imposed upon him the punishment set out in sec. 780 and secondly, that sec. 777 refers to other offences than those mentioned in sec. 773. The first proposition is supported by Rex v. Randolph, 4 Can. C. C. 165, where the court held that stealing from the person a sum less than $10 was a different offence from theft of less than $10 provided for by sub-sec. (a) of sec. 773 and therefore the magistrate could impose a greater penalty than was allowed under sec. 773. This decision inferentially supports the second proposition also, because if sec. 777 is to be con-

strued as conferring on the magistrate the jurisdiction of the Court of Quarter Sessions in Ontario, then a person convicted of any offence which could be tried by that court, which included the offences included in sec. 773, could be given the punishment which that court could impose, while if the section is to be construed as conferring on the magistrates therein mentioned only such additional jurisdiction of the Court of Quarter Sessions as was not conferred by sec. 773, then the punishment for an offence specified in sec. 773, sub-secs. (a) and (b) would be confined to the punishment specified in sec. 780.

Mr. McDonald, in his argument before us, contended that Boyd, C., based his opinion on the marginal note and that the marginal note being no part of the statute the learned Chancellor was wrong in using it to assist in interpreting the statute, and he cited Hardcastle On the Interpretation of Statutes, p. 205.

The learned Chancellor's language is hardly open to the construction put upon it by Mr. McDonald. At p. 401 he says: "I think the correct reading of that section is suggested by the gloss in the margin, that it is intended to comprehend summary trial 'in certain other cases' than those enumerated specifically in sec. 783" (773). This I think means that the marginal note states correctly what in his opinion the section means.

I have come to the same conclusion from a perusal of the Act without the side notes. Sec. 777 confers upon the "magistrate," under which term is included the police magistrate who made the conviction on this case, the jurisdiction to try the accused for the offence for which he was convicted. Sec. 773, sub-sec. (c).

Having, therefor, the jurisdiction to try that offence, sec. 777, which confers on him the jurisdiction of the Court of Quarter Sessions in Ontario, cannot be construed as conferring upon him the jurisdiction he already has, but must be intended to extend that jurisdiction to the trial of other offences. Then if sec. 776 is to be construed as only giving to a police magistrate in a city the jurisdiction of the Court of Quarter Sessions in Ontario and, as stated in sec. 777 only with his own consent, then these two sections together would have to be read as taking away the jurisdiction already conferred upon the police magistrate to try certain of the offences

set out in 773 summarily and without the consent of the accused. Sec. 774. To put such a construction upon these sections would be to make secs. 773, 774, 776 and 777 inconsistent with one another, the jurisdiction conferred by 773 and 774 being taken away by secs. 776 and 777, while to put the other construction upon it would be to make them all consistent with each other. I, therefore, prefer that interpretation that gives to a police magistrate in Saskatchewan absolute jurisdiction over the offences specified in 773 and jurisdiction over such other offences as may be tried before the Court of Quarter Sessions in Ontario only with the consent of the accused.

For these reasons I think that the conviction should be confirmed.

Conviction affirmed.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

WILLIE v. DELISLE.

Sale of Goods—Sale of Chattel by Third Person in Presence and With Consent of Owner—Title—Sale of Goods Act (R. S. S. ch. 47, sec. 23)—Unregistered Lien Note—Invalid Against Subsequent Purchaser in Good Faith for Valuable Consideration.

The sale of a chattel by a third person in the presence of and with the consent of the owner confers a good title on the purchaser under the Sale of Goods Act (R. S. S. ch. 147, sec. 23).

An unregistered lien note is invalid against a subsequent purchaser in good faith for valuable consideration.

An appeal by plaintiff in an action for the recovery of one horse, or its value ($150), alleged to have been wrongfully taken from the plaintiff by the defendants, and for general damages for the wrongful taking.

The appeal was heard by HAULTAIN, C.J., ELWOOD, BROWN and MCKAY, JJ.

G. A. Cruise, for plaintiff, appellant.

Arthur Frame, for defendants, respondents.

The judgment of the court was delivered by

McKay, J.:—The defendants Delisle Brothers took the horse out of the possession of the plaintiff on the 28th of April, 1914, under a lien note made in their favour by one A. R. Mayo to whom they sold the horse in September, 1912. The lien note in question was not registered, as required by the Act respecting Lien Notes, being ch. 145, R. S. S.

The plaintiff claims he bought the horse and other chattels for $500 and a farm for $1,700 from Mrs. A. R. Mayo, Mr. A. R. Mayo the original buyer of the horse in question from Delisle Brothers being present.

The learned trial judge dismissed the action because he came to the conclusion that there was no evidence before him to shew how Mrs. Mayo became the owner of the horse, and further says that "He," the plaintiff, "did not purchase from Mayo and he can get, I think, no better title under sec. 23 of the Sale of Goods Act than the person who sold to him can give."

But on the other hand, he found that the purchase of the horse by plaintiff from Mrs. Mayo was in good faith and that he paid for the articles bought.

The evidence shews that the plaintiff purchased the horse in question and other chattels and a farm from Mrs. Mayo on the 22nd April, 1914, and that during the negotiations Mrs. Mayo was present and took part in the same, and was also present at the conclusion of the purchase.

[The learned judge here quoted portions of the testimony of the plaintiff, the only witness who gave evidence regarding the purchase.]

If Mrs. Mayo had no right in herself to sell to plaintiff, it seems to me in the face of the foregoing evidence she had such right with the authority and consent of Mr. Mayo, he being present at and a consenting party to the sale, and actually taking part in it. It was in effect a purchase from Mr. Mayo himself, and under these circumstances Mrs. Mayo could transfer as good title under sec. 23 of the Sale of Goods Act, ch. 147, R. S. S., as Mr. Mayo himself.

True it is that Mrs. Mayo gave a bill of sale in her own name, but the horse in question was taken possession of by the plaintiff the day after his purchase and kept in his possession until taken from him by the defendants Delisle Brothers.

If then it was a purchase from Mrs. Mayo, either in her own right or with Mr. Mayo's authority and consent, I think the purchase is good as against the defendants and plaintiff entitled to the protection of the Act respecting Lien Notes.

Under the Act the defendants Delisle Brothers can only set up their right of property in the horse as against a purchaser from the buyer or bailee of the horse, in good faith for valuable consideration, if the note is registered.

The note was not registered and the learned trial judge finds that the purchase was made in good faith and the horse paid for, and there is ample evidence to warrant this finding. This then to my mind constitutes the plaintiff a purchaser in good faith for valuable consideration within the meaning of the Act, and the defendants Delisle Brothers cannot be permitted to set up their rights under the lien note against him. I do not think it is necessary to quote any authority further than to refer to Roff v. Krecker, 8 M. R. 230, where Taylor, C.J., reviews all the authorities both in England and Ontario upon statutes using similar language as ours.

There is no direct evidence of what damages the plaintiff suffered, but as the horse was taken by defendants Delisle Brothers while the plaintiff was working him in his seeder during seeding time, and was kept by defendants Delisle Brothers until taken from them by the sheriff, the evidence not shewing when, the plaintiff must have suffered some damage; I will therefore allow $15 damages.

There is nothing in the notice of appeal to shew that the judgment in favour of the defendant Brown is appealed from, although the form of notice would indicate that the appeal is against the whole judgment, except that defendant Brown's name does not appear in the style of cause, neither did he appear on the appeal by counsel. In any event, there is no evidence against him.

For the foregoing reasons I am of opinion that this appeal should be allowed with costs as against defendants Delisle Brothers, and judgment be entered in plaintiff's favour as against them in the court below for a return of the horse, or its value $150, and $15 damages, with costs, but judgment below should stand dismissing the plaintiff's action against defendant Brown with costs. No costs of appeal to Brown.

Appeal allowed.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

WESTERN TRUST CO. v. DUNCAN AND WILLOUGHBY.

Employer and Workman — "Factory" — Workmen's Compensation Act, sec. 2.

The word 'factory' as used in sec. 2 of the Workmen's Compensation Act applies to every building in which machinery driven by mechanical power is used and is not restricted in its meaning to buildings used for industrial purposes.

An appeal by the plaintiff from the trial judgment in an action under the Workmen's Compensation Act brought by plaintiff as administrator of the estate of Joseph Stoddard, deceased.

The appeal was heard by NEWLANDS, ELWOOD and MCKAY, JJ.

F. L. Bastedo, for plaintiff, appellant.

G. H. Barr, for defendants, respondents.

The judgment of the court was delivered by

NEWLANDS, J.:—The deceased was killed while operating the elevator in a building owned by the defendants, the lower storey of which was used as stores and the upper storeys as apartments and offices. No manufacturing was carried on in the building. The elevator in question was operated by machinery driven by electric power.

I agree with the learned trial judge that the deceased was killed in the course of his employment and the only question which I think requires consideration in this case is the last clause of the trial judge's judgment in which he says:—

"I further conclude and hold that the portion of the definition upon which the plaintiff relies, and which I have discussed, is to be governed and understood by and in the light of the general purpose and object of the Act, and is therefore to be construed as intending and meaning only industrial buildings, workshops, places or machinery. As neither the

Willoughby-Duncan block, nor the place of its elevator, nor the machinery itself, partakes of this character, the Workmen's Compensation Act, as I have interpreted it, is not applicable to the circumstances of this case."

The interpretation clause in the Act in question reads as follows:—

"2. 'Factory' means a building, workshop or place where machinery driven by steam, water or other mechanical power is used."

The interpretation which the trial judge has put upon this section is that the word "factory" means an "industrial" building, etc., etc. He adds to the interpretation given in the statute the word industrial. This, in my opinion, is not interpreting the section but legislating as it restricts what is the plain meaning of the words. In discussing this phase of the question the learned trial judge says:—

"Put in its most general form the definition would read that any 'place where machinery driven by mechanical power is used' is a factory, and therefore within the Act. This, literally, would mean that every shop, school, residence, church, office or other place, where an electric fan, electric sweeper, electric clock or other machinery driven by mechanical power, no matter how simple, and no matter to what purpose applied, was used, would be, as to the place of such use at least, a factory, and within the scope and application of the Workmen's Compensation Act. In fact, every place where a wheel is turned by mechanical power would be a factory and within the Act."

That the Legislature was of the same opinion as the trial judge is shewn by sub-sec. 2 of sec. 14 of the Act, which reads as follows:—

"(2) The word "factory" as defined in this Act shall not be held to include any building, workshop, place or mill on a farm used for the purposes only of such farm."

The Legislature was evidently of the opinion that, without this exception, a building on a farm in which machinery driven by mechanical power was used would otherwise be within the Act. Such a building would not necessarily come within the construction put upon the word "factory" by the learned trial judge and therefore, if his interpretation of the word "factory" was the one intended by the Legislature, that exception would have been unnecessary.

I think we should follow the rule for the construction of statutes which requires us to give to the words their plain and ordinary meaning which is, that every building in which machinery driven by mechanical power is used is a factory under that Act and not restrict the meaning to buildings used for industrial purposes only.

As the evidence in this case shewed that the elevator in question was in the building owned by defendants, that it was run by machinery which was also in the building and was driven by mechanical power and that deceased was employed by them to operate the same and that he was killed in the course of his employment, I think plaintiff is entitled to recover.

I think the amount of compensation fixed by the trial judge is sufficient and should be divided in the proportions mentioned.

The appeal should be allowed with costs, plaintiffs to have their costs of trial as well.

Appeal allowed.

ALBERTA.

MARCH 26TH, 1915.

SUPREME COURT—APPELLATE DIVISION.

COCHLIN v. MASSEY HARRIS.

Evidence — Identification of Letter Produced by Witness Called by Judge — Execution — Execution Creditor of Landlord Seizing Grain of Tenant—Fi. Fa. Goods and Fi. Fa. Lands — Entry — Possession — New Trial.

Where a bailiff made a seizure of goods the question arose as to whether or not he had done so under the direction of the execution creditor. The bailiff upon being called by the judge produced a letter addressed to himself purporting to be signed by a person on behalf of the execution creditor directing the making of the seizure. Upon the production of the said letter objection was taken in vain to its reception in evidence on the ground that it had not been identified:—

Held, (BECK, J., dissenting) that there should be a new trial since (1) the signature of the person who signed the letter and his authority were not proved. (2) that if there were facts in evidence from which it might be inferred that the letter was written with the authority of the execution creditor, the trial judge should have left the said facts to the jury who alone were competent to draw an inference therefrom.

Although there is no express power in a writ of *fi. fa.* goods to enter upon land there is an implied power to do so for the purpose of seizing the goods and to remain in possession of the goods on the land for a reasonable time.

A writ of *fi fa.* lands impliedly confers power to enter upon the land for the purpose of seizure but does not give the sheriff any right to go into possession.

Any rights existing in the sheriff or the execution creditor for preservation of land in the condition in which it was when it became bound or was seized must be vindicated by an appeal to the powers of the court to grant such remedies as an injunction or a receiver order, the said remedies being independent of the remedy under the writ of *fi. fa.*

An appeal from the verdict of a jury and the judgment thereon of IVES, J.

The appeal was heard by HARVEY, C.J., STUART, SCOTT and BECK, JJ.

J. W. McDonald, for plaintiff, respondent.

W. H. McLaws, for defendant, appellant.

HARVEY, C.J.:—I agree with my brother Beck that the defendants are not entitled to a judgment dismissing the action on the ground that the seizure could have been lawfully made by the sheriff if he had taken the proper steps. I am of opinion however that they are entitled to succeed on this appeal and that there should be a new trial.

The learned trial judge in his address to the jury quite clearly informs them that there is no evidence of liability of the defendants without the letter to which my brother Beck refers. After having indicated this quite clearly in the early part of his charge he sums up at the end with these words:—

"I think therefore that the question you should answer should be: Was this letter, exhibit 6, a direction from the defendant to the sheriff which resulted in the seizure of the plaintiff's grain? If so then I think the only other matter you have to deal with is to assess the damages."

When the letter was produced by a witness objection was taken to its being given in evidence on the ground that it had not been identified. The record does not shew that any regard whatever was paid to this objection. This may have been due to the fact that the witness who produced it had been called by the trial judge for the purpose of producing it and that he did produce it in response to a request by the judge, but be that as it may, the objection appears to have been treated as if it had been an admission that the letter was the letter of the defendants.

The proof that the letter was that of the defendants involved two elements, viz., the signature of the person who signed it and his authority. Proof of them might have been waived and perhaps in the absence of objection that might have been the result here since the witness stated that he received the letter from the defendants. Objection however was taken and in my opinion the letter should not then have been accepted as evidence without prima facie evidence that it was the letter of the defendants. My brother Beck expresses the opinion that there were facts in evidence from which it might fairly be inferred that it was the defendants' letter. This may be so, I express no opinion, but if the fact is in doubt it is for the jury to say whether from these facts they do infer that it is the defendant's letter. That was not left to the jury. The trial judge assumed that it was the defendants' letter both in allowing it to be accepted as evidence and in referring to it in his charge to the jury.

I think the letter was improperly received in the manner in which it was received and that if it had been received on the ground suggested the jury should have been instructed with regard to it. It appears to me also that the argument that there was evidence, other than the letter, of the liability of the defendants, carries the case no further because the jury was given no instruction as to that, but on the contrary was told that the letter was the only evidence. It is clear, therefore, in my opinion, that there was an improper reception of evidence or if not at least a failure to give proper direction to the jury and that there should be a new trial in consequence.

I express no opinion regarding the calling of the witness by the trial judge. It is a matter not free from difficulty and whether the trial judge was right or wrong could not affect the conclusion I have reached for if he were wrong the result would be a new trial which I would allow on the other ground in any event.

I would allow the appeal with costs and direct a new trial the costs of the former trial to abide the result of the new trial.

BECK, J. (dissenting):—The defendants were execution creditors of one Louis Audette with writs of fi. fa., both goods and lands, in the hands of the sheriff and fi. fa. lands filed in the Land Titles Office.

Audette was the owner of certain lands. After the writ of fi. fa. was filed in the Land Titles Office, he leased the lands to the plaintiff, Cochlin, for the term of 7 months from the 2nd of March to the 2nd of October, 1914. Cochlin had put in a crop and had reaped it and was in the course of threshing it when on the 31st August, the grain, partly threshed and partly not threshed, was seized by the sheriff's bailiff, one Vander Voort, under fi. fa. goods against Audette. The threshing was ultimately completed. The seizure was finally withdrawn on the 12th October.

The jury gave a verdict for the plaintiff assessing the damages at $500, and the learned trial judge directed judgment to be entered accordingly.

The defendants' counsel on this appeal asks in the first place that judgment be entered for the defendant. His ground, as I understand it, is this:—

Assuming what however he disputes, that there was a direction by the defendants to the sheriff to seize the specific goods, the grain, the direction does not make the defendants liable inasmuch as it was within the authority of the sheriff, and therefore within his duty, to seize the grain, independently of any specific direction. His authority to seize this grain was derived from fi. fa. lands in this way:—The Land Titles Act, sec. 77, has the effect of making any dealing with the land after the filing of the execution in the Land Titles Office subject to the right of the execution creditor. The plaintiff's interest as tenant was, therefore, subject to the plaintiff's rights as execution creditor. The grain immediately after seeding at all events was part of the realty and was, therefore, bound by the fi. fa. lands, and remained bound notwithstanding subsequent severance.

There are some assumptions in this argument which cannot be accepted.

Growing crops of the character which fall within the definition of emblements partake of some of the characteristics of personalty. Emblements are the growing crops of those vegetable productions of the soil, which are annually produced by the labour of the cultivator. They are a species of fructus industriales but do not exhaust the genus. While yet remaining in union with the soil they have in several particulars, the nature of personal, as distinguished from real estate. For instance in the case of the death of the owner of the fee the emblements go to the personal representatives;

As between landlord and tenant, the tenant is entitled to the emblements if the lease is unexpectedly terminated by the Act of God or the law, or by the act of the landlord not grounded upon the tenant's default and in many localities there is a custom which gives the tenant the emblements though the term expires merely by lapse of time, between seed time and harvest, and this custom has, in some jurisdictions, been recognized and established by statute; in the case of executions, the emblements, while still united to the soil and still unmatured, are exigible under a writ of execution against the goods of the tenant. Evans v. Roberts (1826), 5 B. & C. 829; 29 R. R. 421; Marshall v. Green (1875), 1 C. P. D. 35; 45 L. J. 153. On the subject generally, see Stephens Com. 7th ed., vol. 11, pp. 214, et seq., Ency. Laws of Eng. 2nd ed., tits. "Emblements" and "growing crops;" 14 Hals. pp. 45 et seq.; 18 Ib. pp. 197 et seq.; 21 Ib. pp. 197 et seq.; Freeman on Executions, sec. 113; 24 Cyc. tit. "Landlord and Tenant," pp. 1067 et seq.; 27 Cyc. tit. "Mortgages" pp. 1144 et seq.; 12 Cyc. tit. "Crops," p. 977; 17 Cyc. tit. "Execution," pp. 941 et seq., Hayden v. Crawford, 3 U. C. Q. B. O. S. 583; Park v. Humphrey, 14 U. C. C. P. 209; Kilbride v. Cameron, 17 U. C. C. P. 373; McDougall v. Waddell, 28 U. C. C. P. 191; McDowell v. Phippen, I. O. R. 143; Cameron v. Gibson, 17 O. R. 233.

If a mortgagee of the land were to take possession he would be entitled to the land in its condition with regard to the crops in which it chanced to be at the time of his taking possession as against the mortgagor and those claiming under him by title subsequent to the mortgagee (see the two last cited cases.) The same principle would probably apply to the case of a purchaser of the land at a sale under execution against the land or under other judicial authority.

A fi. fa. land gives no authority to the sheriff to put the execution creditor into possession of the lands. On a sale and the issue of a transfer to the purchaser—and in view of our Land Titles Act, I should say on the purchaser, also, obtaining a certificate of ownership,—the purchaser may take proceedings to obtain possession. See Galliver v. Beaton, 12 U. C. C. P. 519; 17 Cyc. tit. "Execution," pp. 131 et seq. In Brown v. Page, 11 Grant 239 and Mason v. Carpenter, 13 Grant 329, injunctions were granted at the instance of an execution creditor with an execution against lands in the sheriff's hands restraining the diminishing of the value of

land bound by the execution by the cutting and removal of timber, but timber is not fructus industriales but naturales. It is not personal property until actual severance; therefore, it is part of the realty.

No actual levy—this word I think is identical with seizure—seems to be necessary in the case of lands. See 17 Cyc. tit. "Executions," pp. 1092 et seq., though no doubt a levy of specific property is quite proper and perhaps in some cases necessary in order, for instance, to specify some out of a larger number of properties. But even a levy of specific property I think gives no right to the sheriff to remain in possession by virtue merely of the fi. fa. lands. The tenor of the writ is that:—"You cause to be made of the lands of the execution debtor." That command, I think, can only be executed by a sale.

In Kirk v. Burgess (1888), 15 O. R. 608, it was held, quite properly, I think, that a judgment creditor was entitled to a receiver order to collect the rents of lands of the judgment debtor prior to the time at which the sheriff was entitled to sell the lands under the fi. fa. lands in his hands. The order was made upon the application of the judgment creditor. Possibly an application by the sheriff might have been entertained; but in any case the order was looked upon as a method of equitable execution granted by reason of the absence of a remedy equivalent in effect to that under the fi. fa. lands.

It was urged that a fi. fa. lands authorizes the sheriff to make a seizure by going upon the lands, which is undoubtedly correct, and having done so to remain in possession until the time for sale arrives as in the case of goods; this latter proposition, I think, is not correct.

There being no fi. fa. lands in England, no direct English authority is available but the case of a seizure of a leasehold term under a fi. fa. goods seems analogous, and the law applicable in such cases seems to be correctly stated in Foa in Landlord and Tenant, 5th ed., p. 437, as follows:—

"When a term is sold under a fi. fa. seizure of the lease—and a consecutive seizure for this purpose is sufficient (Coleman v. Rawlinson, I. F. & F. 330)—it does not vest the term in the sheriff, but it remains in the debtor, even after the sale until actually assigned (by deed as in other cases) by the sheriff to the purchaser (Playfair v. Musgrove, 14 M. & W. 239); nor has the sheriff power, except with the debtor's

consent (Taylor v. Cole, 3 T. R. 292), to place in possession the purchaser (R. v. Deane, 2 Show. 85; Playfair v. Musgrove, supra), who is, as a rule, left to the remedy of bringing ejectment (Dor v. Minless, 6 M. & S. 110)," and in Coleman v. Rawlinson, supra, Willes, J., expressly says, "The sheriff under the fi. fa. could not enter on the land, he could only seize the lease."

There is no express power in a fi. fa. goods or lands for the entry upon land; but in the case of a fi. fa. goods there is a power unexpressed to enter upon the land for the purpose of seizing the goods and to remain in possession of the goods on the land for a reasonable time. In the case of a fi. fa. lands there is no doubt power, unexpressed, to enter upon the land for the purpose of doing the act of seizure; but there seems no more reason why the sheriff should have a right to go into possession in such a case than in the case of the seizure of a term of years.

If entitled to remain in possession of land from the time of seizure until sale, would the sheriff be entitled to take possession and occupy all or any of the buildings on the land? If the former right is admitted the latter right would seem to follow. But I can find no trace of authority for either proposition.

It seems to me that any rights in the sheriff or the execution creditor for preservation of the land in the condition in which it was at the time it became bound or was seized, must be vindicated by an appeal to the powers of the court to grant such remedies as an injunction or a receiver order and that such remedies are remedies which are independent of the remedy under the fi. fa.

In my opinion, therefore, the right of the parties in this action do not depend at all upon the fi. fa. lands. The grain seized had not passed out of the ownership of Cochlin the tenant, before severance, nor, assuming such remedies were open, had its severance been prohibited by injunction, or its character as part of the realty been preserved by receiver order made before severance. The grain, therefore, was the personal property of Cochlin and was not seizable under the fi. fa. goods against Audette.

It is quite clear that the defendants, the execution creditors of Audette, are liable, if it was by their direction the goods of Cochlin were seized. I think it is equally clear that if the goods were not originally seized by their direction, yet,

though the original act of seizure not having been made in their name or on their behalf could not be ratified, they are liable for any wrong subsequently committed by their direction, such, for instance, as in this case causing the goods to be retained under seizure after a time, when, but for their direction, they would have been released.

On the facts of the case it seems of little consequence whether the defendants directed the original seizure or only the detention of the goods, for the direction to detain, followed practically immediately after the seizure, so that the damages could be but very slightly, if at all, greater than the former than in the latter case.

That the defendants are liable, if they gave a direction to seize the plaintiffs' goods, is made quite clear by Morris v. Salberg (1889), 22 Q. B. D. 614, and a number of other cases. That though not liable for the original seizure, if they gave no such direction, yet they are liable for any subsequent wrongful act done by their direction is clear on the authority of Winterbourne v. Morgan, 11 East 395; Ladd v. Thomas, 9 L. J. Q. B. 345; Lynch v. Bickle, 17 U. C. C. P. 549; West v. Nibbs (1847), 4 C. B. 172; 17 L. J. C. P. 150, also seems to me quite clearly to recognize this and we are no longer troubled, as the judges there were, by the question what was the proper form of action.

I think there was evidence, independently of the letter I shall have to refer to later, that the defendants directed the actual seizure; but the learned trial judge excluded this evidence from the consideration of the jury and told them that the only evidence of direction by the defendants which was open for their consideration was a letter said to have been written by an officer of the defendants. On this instruction of the learned judge the jury found expressly that the letter was a direction by the defendants to the sheriff to make the seizure of the particular goods in question. But this letter came before the jury as part of the evidence of Vander Voort, the bailiff, on his being recalled by the trial judge. The circumstances in this connection are as follows:—

At the conclusion of the plaintiff's case counsel for the defendant moved for a dismissal of the action on the grounds, among others, "that the action is improperly brought as against the defendants, the Massey Harris Co., Ltd.; the action should have been against the sheriff or the sheriff's bailiff; that unless the sheriff has received special instructions the sheriff only is liable."

The motion was not granted and the case for the defence proceeded. Subsequently on the case resuming on the following morning, the jury were directed to retire and the learned judge expressed the opinion that on the evidence as it stood at the conclusion of the plaintiff's case, the plaintiff had not made out a case, inasmuch as, in his opinion, there was no evidence of a direction by the defendants to the sheriff or the bailiff and there could be no ratification of the act either of them in such a case.

After a lengthy discussion, the learned judge, addressing the counsel for the plaintiff, said:

"The court: Well, I think the best I can do for you is this, I think I shall recall the jury and recall the bailiff and examine him myself. I do not think I can go any further.

Mr. McDonald: Well, will your Lordship do that?

The court: Yes.

Mr. Fawcett: I object to that on the ground that my motion was made at the time the plaintiff closed his case and I think I am in a position to produce to your Lordship law to shew that this would be an improper procedure.

The court: Is there not a rule that enables me to do that?

Mr. Fawcett: I do not think so. The case was closed when the motion was made and your Lordship overruled the motion at that time and then we went on and gave our evidence. Now, had your Lordship taken the same stand in regard to the letter then, as now, my learned friend.

The court: Well, yes, I suppose I did take a stand then by asking you to go on with your defence. But there is nothing to prevent me allowing the matter to go on and directing the jury to assess damages if they find any, and then it is a matter for me to enter the verdict or not, but if I allow it to go on you would not say that I should be excluded from giving leave to the plaintiff to recall the bailiff or to examine him myself?

Mr. Fawcett: No, my Lord, you are at perfect liberty but none of that evidence can affect the position I was in at the close of the plaintiff's case because my right was absolute at that point, whatever rights they were absolute at that point and by giving in evidence afterwards, I cannot help the plaintiff because my objection was taken at a certain stage, and had your Lordship so ruled as I say——

The court: You may be right, but I think I should take the chance of being guided by that evidence.

Mr. Fawcett: Yes, I understand that. But your Lordship will note the objection I make and you will note that it is the position I take.

Mr. McDonald: Then I assume I have to send for the bailiff? He will probably be here in a hour and a quarter.

The court: Yes, because I think it will probably hasten matters."

The witness was recalled. His examination which was conducted by the learned judge was preceded by this:—

"Mr. Fawcett: I wish to make the specific objection——

The court: (dictating objection) This witness is recalled by the judge, and counsel for the defendant objects that any evidence given by him on his recall cannot effect the position of the defendant or his rights at the close of the plaintiff's case.

Mr. Fawcett: I have a further objection, that this is a plaintiff's witness and not recalled by ourselves.

The court: I am recalling him.

By Mr. Fawcett: Yes, I understand that. And I object to a plaintiff's witness being recalled in the middle of a defendant's case."

The witness said as follows:—

"Q. Now, under what authority do you make the seizure? A. Why, I had instructions from the Massey Harris Company.

Q. When? A. I got a letter from them; I think it was on the 29th of August.

Q. From the Massey Harris? A. Yes, sir.

Q. Have you got the letter?

Mr. Fawcett (counsel for defendants): I object to that. There is no identification of the letter as yet."

The letter was put in as an exhibit.

The learned judge continued the examination of the witness. No request was made by counsel on either side to be permitted to examine or cross-examine the witness further.

The case went to the jury and they were specifically asked whether the seizure was made of the particular grain in consequence of this letter and they said yes.

It is urged on the part of the defendants (appellants) that there was a mis-trial by reason of the fact that the witness Vander Voort was recalled by the judge and that (1) the judge had no right to recall the witness; (2) that being a witness called by the judge he was not subject to cross-ex-

amination by counsel for either party; and (3) that it appears that counsel understood that such was the rule and consequently refrained from cross-examination.

In Coulton v. Desborough, [1894] 2 Q. B. 316, the Court of Appeal (Lord Esher, M.R., A. L. Smith & Davey, L.J.J.), held that a judge had a power to call a witness not called by either party.

The Master of the Rolls said:—

"If there be a person whom neither party to an action chooses to call as a witness and the judge thinks that the person is able to elucidate the truth, the judge in my opinion is himself entitled to call him; and I cannot agree that such a course has never been taken by a judge before. When a witness is called in this way by the judge, the counsel of neither party has a right to cross-examine him without the permission of the judge. The judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted."

In Re Enoch & Xaretzky Bock Co., [1909] 1 K. B. 327 the Court of Appeal (Cozens-Hardy, M.R., and Fletcher, Moulton and Farewell, L.J.J.), considered the previous case. This latter decision would restrict the power of the trial judge to call a witness not called by either part to the case where neither party objects to the witness being called and Farewell, L.J., says, disagreeing with the express language of A. L. Smith, L.J., in the earlier case, that in the event of the judge doing so, the witness is not to be treated as "the witness of the judge" but as an ordinary witness, but that it is not open to counsel on either side to comment on the evidence given, on the footing that he is either the plaintiff's witness or the defendant's witness.

Accepting these opinions of different members of the Court of Appeal, I think what the learned trial judge appears to have done in the present case was not objectionable. He stated to counsel that he proposed to recall Vander Voort. Recalling a witness already put forward and examined by one of the parties is obviously a very different thing from the trial judge himself introducing a new witness. In

my opinion a trial judge has a right to recall a witness who has left the box, whether it is objected to or not.

But in any case the recalling of this witness was not objected to except on an untenable ground. Certainly not by counsel for the plaintiff, for he was anxious that the witness should be recalled; not by the defendant's counsel, for the judge said to him "if I allow it to go on you would not say that I should be excluded from giving leave to the plaintiff to recall the plaintiff or to examine him myself?" and the answer was "No, my Lord, you are at perfect liberty; but none of that eidence can effect the position I was in at the close of the plaintiff's case," a position in law which is quite untenable.

I should be of opinion that a witness so called or recalled by the judge, is subject as of right to cross-examination, subject only to the control of the judge as expressed in the rule 199. "The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be enquired into in the cause or matter," or in the case of a witness recalled which has been covered by cross-examination when he was befote in the box, which probably is covered by the rule against vexatious questions.

But whether or not my opinion in this respect is right, the question did not arise; no request was made by either counsel to examine the witness further; and one can have no doubt that the learned judge would have allowed any proper questions from either side, certainly by way of cross-examination by the defendant's counsel had it been requested.

I have myself, on a great many occasions, continued the examination of a witness after counsel for the parties have finished with him and have almost always immediately asked counsel if either wished to ask him any questions on the answers given to me. I am quite sure that this would be the attitude adopted by any judge under ordinary circumstances in the case of a judge calling or recalling a witness. I see nothing to indicate that the defendant's counsel refrained from cross-examining the witness or requesting permission to do so because of anything occurring to indicate that the learned judge would not permit it.

An objection is taken to the letter because it is said, it is not shewn to have been written by or with the authority of the defendants. The subscription to it is: "Massey-Harris

Co., Limited—G. H. Stenishorn, Chief Collection Department."

The witness said that he had got a letter from the defendants and produced the letter in question as being the letter referred to, and said in effect that he had got it before he made the seizure. His evidence given in the earlier stages of the trial shewed, by fair inference, that it was in consequence of this very letter he, immediately upon the seizure, placd himself in communication with the Collection Department of the defendant company by telephone and asked that one Mitten, of the defendant's Collection Department, should be sent down, and he accordingly was sent down to advise and assist the bailiff. From this it seems to me it is a fair inference that the letter was wsitten with the defendant's authority.

For reasons indicated, I am of opinion that the appeal should be dismissed with costs.

SCOTT and STUART, JJ., concurred with HARVEY, C.J.

Appeal allowed; BECK, J., *dissenting.*

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

BELLAMY v. ROBERTSON.

Husband and Wife—Marriage—Promise to Marry—Mutual Abandonment.

In an action for breach of promise of marriage, a letter from the woman to the man offering to return "any or all of your gifts as you wish" and requesting the man as a personal favour not to return to her "the gifts I have given you from time to time although I know this is perhaps the usual thing to do," and concluding with "for as you say there is no reason why we should not remain friends," is not in itself conclusive evidence of the woman's intention to absolve the man from his promise.

Judgment of NEWLANDS, J., 29 W. L. R. 847, reversed.

An appeal from the judgment of NEWLANDS, J., 29 W. L. R. 847, in favour of defendant in an action for damages for breach of promise of marriage.

The appeal was heard by HAULTAIN, C.J., LAMONT, BROWN, ELWOOD and MCKAY, JJ.

J. N. Fish, K.C., for plaintiff, appellant.

J. F. Bryant, for defendant, respondent.

LAMONT, J.:—There is no question about the contract to marry; that is admitted by the defendant. His defence is that in October, 1913, it was mutually agreed between the plaintiff and himself that the engagement existing between them should be terminated, and that the same was then terminated. The action came on for hearing before my brother Newlands, who held that the engagement had been terminated by mutual consent. From that decision the plaintiff now appeals.

In July, 1913, the defendant wrote to the plaintiff at Saskatoon stating that in his opinion it was inadvisable that they should get married, and setting out a number of reasons therefor. On August 29th he again wrote to her. The tenor of this letter shewed clearly a desire on his part to terminate the engagement, but near the end he used the following words: "However, Mabyl, if you think we can get along together and see things in a different way than we see them now, we'll let the bargain stand, but if otherwise let us call the deal off. It is up to you." On September the 5th the plaintiff replied explaining certain matters at which the defendant seems to have taken offence. Her attitude throughout this letter is, I think, set forth with reasonable clearness in one of the closing paragraphs where she says: "I have taken you at your word all the way through when you said 'My love for you has never changed,' and if you loved me as you said then there could be no doubt how we would get along in later days. But if on the other hand you do not care for me then it is a different affair altogether. I do think though that we should have a personal interview on the matter before we make a final decision in order that there may be no mistake because as you say it is a serious thing." An interview took place about a month later. At that interview the defendant says he left the matter of continuing the engagement to the plaintiff, and that she agreed to its termination. She says she did not agree to it, and further says that the only way it was left to her was by the defendant saying in a vehement manner, "I will marry you, Mabyl Bellamy, damn it, if it takes every cent I make to keep you, and I will

leave you in a house here in Saskatoon and I will go to Regina to live." In reference to this interview the plaintiff at the trial gave the following evidence:

"Q. Then when you parted had you given him any release from the engagement? A. No. He said 'What are you going to do about it?' and I said 'I haven't decided.' He said 'Will you write to me,' and I said 'Yes.' He said 'Will you write within two weeks?' I said 'Yes.'

Q. Did you write him? A. I did.

Q. How long afterwards was it written? A. It was about 17 days I fancy, a little over two weeks."

The following is her letter:—

"Saskatoon, Oct. 26, 1913.

"Dear friend:

You asked me to write to you and I said I would. It has been a mystery to me ever since why I should have made that promise for there is really nothing to say. I would not have you think that is why I have not written sooner. It was because I have not had the time. I have had only one spare evening since you were here and that was because I was so tired and sleepy that I just couldn't keep awake. Rather an unusual thing for me you will think but it is the best under the circumstances I think.

However, I said I would write and here I am and since there seems nothing else to say I will ask as a special favour that you will not return any of the gifts I have given you from time to time although I know this is perhaps the usual thing to do. I would say I have mislaid your street address and if you will kindly send me that I will be pleased to send you any or all of your gifts as you wish. I would not risk to send them as I am sending this.

Trusting that you will forgive my long delay in writing and if you should be in the city any time we would be pleased to have you call. For as you say there is no reason why we should not remain friends.

I remain yours,

M. Bellamy."

In his judgment the learned trial judge referred to the case of Davis v. Bomford (1860), 6 H. & N. 245. That case was also an action for breach of promise of marriage, in which it was proved that, the defendant having written a letter to the plaintiff desiring to terminate the engagement,

called at her father's house, and a conversation took place respecting the return of letters. The defendant returned the plaintiff's letters. The plaintiff said: "No, I cannot give up your letters, it would be like giving you up altogether." The plaintiff left her home and went to reside with an aunt, and no correspondence took place between the parties for a period of two years. It was held that there was evidence from which a jury might infer that the plaintiff had exonerated the defendant from his promise before any breach. After referring to this case the learned trial judge in his judgment said: "If mere silence in answer to the defendant's request to terminate the engagement is sufficient to shew its termination, her (the plaintiff's) letter offering to return his presents and asking him to keep hers is equally evidence of its termination." In addition to this ground upon which the trial judge based his judgment, counsel for the defendant sought to support the judgment on other grounds. He argued that the question of continuing or ending the engagement had been left to the plaintiff. In my opinion, his saying in a vehement manner that he would marry her but that she should live in Saskatoon while he lived in Regina is not leaving the matter to her within the meaning of their contract to marry, as marriage presupposes a living together. Then counsel argued that the evidence warranted the conclusion that the plaintiff had agreed to release the defendant the night of their interview in October. The answer to that is that although the defendant swore to this in his evidence at the trial the learned trial judge evidently did not accept it, otherwise he would have found accordingly, and would not have found the evidence of her agreement to terminate the engagement in the expressions used in the letter of October the 26th. In the alternative counsel stated that when, on the night of the interview, the plaintiff agreed to write to the defendant, it was for the purpose of conveying her decision whether or not she would release him, and that her letter, in view of that fact, must be held to be a release. This contention is negatived by the letter itself. In the opening paragraph the plaintiff says that it is a mystery to her why she promised to write, because there was really nothing to say. This is totally inconsistent with the idea that she was conveying to the defendant in that letter her decision on the important question of whether or not she would release him.

Then does the letter itself contain expressions from which it should be inferred that she was agreeing to the termination

of the engagement? With great deference, I cannot see that such an inference should be drawn from the letter. Where the letter at the outset expressly states that she has nothing to say, the subsequent language, in my opinion, must be clear and unequivocal to justify the drawing of a conclusion that she was acquiescing in the termination of the engagement. In the very paragraph in which she asks him not to return her gifts but agrees to return his, she says: "However, I said I would write and here I am and since there seems nothing else to say I will ask you as a special favour that you will not return any of the gifts I have given you from time to time, although I know this is perhaps the usual thing to do." "Usual" under what circumstances? Did she mean it was usual when contracting parties were mutually agreeing to end an engagement, or was it usual when one party refused to carry out the contract? There is nothing in the letter from which one can determine the circumstances under which she considered it usual. In her evidence she stated that she had never released the defendant. She was asked why it should be a mystery to her that she had promised to write to him. Her answer was: "Because I was not going to give a decision and I did not realise why I should say I would write." There is no doubt in my mind that when the defendant asked her to write it was for the purpose of having her convey to him her decision as to whether or not she would agree to the termination of their engagement. Whether or not it was her intention when she promised to write to give her decision in the letter, is immaterial. When she came to write she used language which to my mind completely negatives the giving of any decision. At that time she herself says she was not going to give any decision. As he had refused to marry her and live with her she was acquiescing in his decision, but she was acquiescing because she could not help herself. She was hurt and wounded by the defendant's conduct and as he did not want to marry her she could not insist on his so doing. Acquiescence in a state of things she could not help, however, is an entirely different thing from abandoning the rights which the law gave her against the defendant when he refused to carry out his contract. The releasing of the defendant from his contract involves an intention on her part to give up whatever rights of action she might have against him in reference to their engagement. That she had any such intention she denies. The onus of

establishing such intention is on the defendant. The offer to return his presents and her asking him not to return hers is, in my opinion, not conclusive of an intention on her part to give up her legal rights. What sentimental considerations may have been in her mind I do not know, but I do not think anything conclusive can be inferred from these expressions in view of the other portions of her letter. In the case of Davis v. Bomford, above referred to, Channell, B., said:—

"I do not attach much importance to the retention of the letters. It is clear that there was no promise after the day when the defendant's letters were given up. From the expressive silence and the plaintiff's change of residence, I should infer that there had been a mutual exoneration."

In that case two years had elapsed without a communication, and the plaintiff had changed her residence without notifying the defendant. In the present case no change of residence had occurred and this action was brought a few months after her letter was written. The Bomford case is authority for the proposition that "where neither party has insisted upon the performance of a contract for a long period after it was made, it may be inferred that they intended to abandon it altogether." 7 Hals. 423. That principle, however, does not apply here. I am, therefore, of opinion that the defendant has failed to establish that he was discharged from his contract before breach thereof.

The appeal should be allowed with costs, the judgment of the court below set aside, and judgment entered for the plaintiff for $500 and costs.

BROWN, J. (dissenting):—The parties had been keeping company for several years and were engaged to be married. On July 6th, 1913, the defendant, having decided that he should or would not marry the plaintiff, wrote her a letter in which he stated that he thought it would be a mistake for them to get married, giving reasons, and asking her to consider the matter. The letter finished as follows:

"So if you are willing to break the engagement, well, we will do so; if not we will let it stand as it is. I have done my part as far as it affects us both. We will still be friends no matter what turns up."

On August 29th the defendant wrote another letter, from which I take the following extracts:

"Now, Mabyl, as regards my other letter I may add that the proposition I made is a very serious one to both of us.

I made it after a very serious thought and consideration. . . . However, Mabyl, if you think we get along together and see things in a different way that we see them now, well, we'll let the bargain stand, but if otherwise let us call the deal off. It's up to you. . . . I have lost a good many hours' sleep over this matter and have given it my deepest thought, and it would be unfair to both of us to harbour thoughts of this kind and not express them. I would like to hear from you soon. Think it over carefully and let me know if you agree with what I have expressed."

On September 5th the plaintiff replied to both of the above letters, part of her reply being as follows:

"In closing I may say I am glad you have been candid and expressed things as you saw them. I have tried to be as frank and to express my views the best I can by letter. I did not intend this letter should be so long and I hope I have not tired you to read it. But better write at length than not to make things as clear as possible. We have never had a quarrel but this is the second misunderstanding we have had for I think it is mainly due to that cause. I have taken you at your word all the way through when you said 'my love for you has never changed,' and if you loved me as you said then there could be no doubt how we would get along in later days. But if on the other hand you do not care for me then it is a different affair altogether. I do think though that we should have a personal interview on the matter before we make a final decision in order that there may be no mistake because as you say it is a serious thing."

On October 9th the defendant, who lived at Regina, went to Saskatoon to interview the plaintiff in accordance with the suggestion contained in her letter. A very lengthy interview took place, and the evidence of the parties is in direct conflict as to the result of it. The defendant says that after full discussion the plaintiff consented to break off the engagement, stating, "I guess it would be better for both of us," that he asked her to write him to that effect, and that the letter hereinafter referred to was written in response. The plaintiff, on the other hand, gives the following evidence as to the result arrived at:

"Q. Then when you parted had you given him any release from the engagement? A. No. He said, 'What are you going to do about it?' and I said, 'I haven't decided.' He said,

'Will you write to me?' and I said, 'Yes.' He said, 'Will you write within two weeks?' I said, 'Yes.'

Q. Did you write him? A. I did.

Q. How long afterwards was it written? A. It was about 17 days, I fancy, a little over two weeks."

On October 26th the plaintiff wrote the following letter:

"You asked me to write to you and I said I would. It has been a mystery to me ever since why I should have made that promise for their is really nothing to say. I would not have you think that is why I have not written sooner. It was because I have not had the time. I have only had one spare evening since you were here and that was because I was so tired and sleepy that I just couldn't keep awake. Rather an unusual thing for me you will think but it is the best under the circumstances I think.

"However I said I would write and here I am and since there seems nothing else to say I will ask as a special favour that you will not return any of the gifts I have given you from time to time although I know this is perhaps the usual thing to do. I would say I have mislaid your street address and if you will kindly send me that I will be pleased to send you any or all of your gifts as you wish. I would not risk to send them as I am sending this.

"Trusting that you will forgive my long delay in writing and if you should be in the city any time we would be pleased to have you call. For as you say there is no reason why we should not remain friends."

It is my belief that the plaintiff at the interview did consent to the engagement being broken off, and at the defendant's suggestion promised to write him. I have no doubt that the defendant made the suggestion so that he might have something from the plaintiff in writing to protect himself from further possible trouble. I can scarcely think, however, that he asked her to write a letter in confirmation of her verbal consent: that would be revealing his purpose too openly. I cannot understand the first part of the plaintiff's letter on any other basis. She says, "You asked me to write to you and I said I would." She does not say, "You asked me to write confirming our interview": no more does she say, "You asked me to write giving my decision"; she simply says, "You asked me to write, and I said I would." She goes on, "It has been a mystery to me ever since why I should have made that promise, for there is really nothing to say."

Now if he had asked her to write confirming the interview, or if she had promised to write giving her decision, there would be no mystery about the promise, and there would at least have been something to say. So that I am disposed to think that neither party stated accurately what actually took place. The letter in its every paragraph, in my opinion, bears striking testimony to the fact that she had, as a result of the interview, given her consent to the engagement being broken off, and that she had simply promised to write without having any particular object in view other than to comply with his request. The learned trial judge, however, in finding for the defendant, has based his judgment entirely on the effect of the letter, and it might therefore be fairly argued that he must have accepted the plaintiff's version of the interview, although he does not expressly so state. Assuming, therefore, that the trial judge did believe the plaintiff rather than the defendant, and that this court should accept his findings in that respect, the question resolves itself into what interpretation should be put upon the plaintiff's letter under the circumstances. She says, "I will ask as a special favour that you will not return any of the gifts I have given you from time to time, although I know this is perhaps the usual thing to do." It is the usual thing to do when? She must surely mean when an engagement is terminated. But she contends that up to this time her decision in the matter was outstanding. I cannot imagine her writing in this strain and at the same time contending that her decision still remains outstanding. I think that under the circumstances these expressions in her letter must be regarded as the equivalent of a consent. She further says, "Trusting that you will forgive my long delay in writing, and if you should be in the city at any time we would be pleased to have you call, for as you say there is no reason why we should not remain friends." She admits that in her last expression she has in mind his letter to her of July 6th above referred to, in which he said, "we will still be friends, no matter what turns up." That expression of his had reference to the engagement being terminated with her consent. Taking her letter as a whole, she desires that he retain her gifts, that they continue to be friends, and she lets him know that his calls whenever in the city will continue to give pleasure. Having in view all the expressions contained in this letter, I find in it a complete acquiescence in the breaking off of the engagement.

I would therefore dismiss the appeal with costs.

I might add that the plaintiff apparently never dreamed of bringing this action until the defendant very ill-advisedly, I think, had caused a solicitor's letter to be sent to her demanding a return of the engagement ring. Being the first to invoke the aid of a solicitor, he cannot very well complain under the circumstances if she has retaliated in kind. I would have thought it better policy on his part, and less expensive, to have purchased another ring if he was really again in need of one.

HAULTAIN, C.J., ELWOOD and MCKAY, JJ., concurred with LAMONT, J.

Appeal allowed; BROWN, J., *dissenting.*

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

STEWART SHEAF LOADER v. JACOBSON ET AL.

Chattel Mortgage—Seizure and Sale Under Prior Unregistered Mortgage—Validity of, as Against Subsequent Mortgagee in Good Faith—Prior Mortgagee Must Account to Subsequent Mortgagee—Right of Subsequent Mortgagee to Bring Action Before His Mortgage Becomes Due—Reference to Take Accounts.

Appeal from the judgment of ELWOOD, J., 29 W. L. R. 575, dismissed.

The appeal was heard by HAULTAIN, C.J., NEWLANDS, LAMONT and MCKAY, JJ.

C. E. Armstrong, for appellant.

H. G. Schull, for respondent.

THE COURT:—On the argument of the stated case herein before Mr. Justice Elwood, it was taken for granted and admitted by all parties that all the mortgages in question were

equally defective so far as the insufficiency of the affidavits of bona fides were concerned. The argument and judgment proceeded therefore on that assumption and dealt altogether with the difficult question as to the rights of a subsequent mortgagee in good faith for valuable consideration under a registered mortgage as against a mortgage prior in date and registration when both mortgages are defective in the same respect.

On the opening of the case in appeal it was pointed out by the court that the mortgage of the plaintiff, the later mortgagee, was not defective. The case accordingly came well within the decisions in Roff v. Krecker, 8 Man. L. R. 230; Moffatt v. Coulson, 19 U. C. R. 341, and Vane v. Vane, L. R. 8 Ch. 399.

It was admitted by counsel for the defendant bank that in this view of the case the appeal must be dismissed and the appeal was therefore dismissed, but without costs to either party.

Appeal dismissed.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

CHURCHILL v. McRAE AND COWIE.

Judgment—Res Judicata—Agreement for Sale of Land and Chattels Thereon—Entire Contract—Title Passing Upon Payment of Purchase Price—Default—Action for the Recovery of Land—Subsequent Action for Recovery of Chattels.

Under an agreement for the sale of land the purchaser was to get title upon payment of the purchase price. At the time of the sale there were on the land agricultural implements, horses, etc., which were included in the agreement by a special clause. Upon the purchaser making default in his payments the vendor brought an action for the balance of the purchase money owing under the agreement without making any reference whatever to the said chattels in his statement of claim which was framed as if the agreement dealt solely with land. The purchaser pursuant to a judgment in the vendor's favour gave up possession of the premises, but refused on demand to give up possession of the chattels. Vendor then brought a second action for the recovery of the chattels:—

Held, that the claim for the recovery of the chattels should have been made in the first action and, not having been made, was thereafter *res judicata*.

Henderson v. *Henderson*, 3 Hare, 114; *Serrao* v. *Noel*, 15 Q. B. D. 549: referred to.

An appeal by plaintiff from the judgment of NEWLANDS, J., in an action for the recovery of chattels sold under an agreement for the sale of land and the chattels thereon.

The appeal was heard by HAULTAIN, C.J., BROWN, ELWOOD and MCKAY, JJ.

J. F. Frame, K.C., for the plaintiff, appellant.

J. C. Martin, for the defendant Cowie, respondent.

P. M. Anderson, for the defendant McRae, respondent.

The judgment of the court was delivered by

BROWN, J.:—The plaintiff, by agreement in writing, dated April 1st, 1911, agreed to sell to one Storey and the defendant Cowie and their assigns, the north-east ¼-6 and the south-west ¼-7-18-15-W2nd., for the price of $8,000, payable $1,200 at the time of the execution of the contract and the balance in instalments at stated times therein mentioned.

The agreement was in the usual form of such agreements, with a provision that upon payment of the purchase price the defendants were to get title.

There were situate on this land at the time of the sale a number of horses, cattle, pigs and agricultural implements, all of which were included in the agreement under the following provision:—

"It is understood and agreed by and between the parties hereto that the consideration hereinbefore mentioned includes also the sale to the purchasers of (here follows a statement of the chattels.)

The purchasers, pursuant to the agreement, went into occupation of the premises and took possession and control of the chattels and from time to time made payments on account of the purchase price. By deed of assignment dated September 16th, 1912, the purchasers assigned all their interest in the agreement and in the land and chattels to the defendants. The defendants got in default with their payments and on February 6th, 1914, the plaintiff brought an action for the balance then owing under the contract, viz.: $4,135.03.

In his statement of claim in said action the plaintiff recites the agreement in question, describing the land and the price and terms of payment, but makes no reference whatever to the chattels. He sets up default and asks for payment of the balance due. In default of such payment he asks that the agreement be cancelled, that he be given possession of the land and that the payments made on account of the purchase price be forfeited to him. There is no reference whatever in the statement of claim to any of the chattels, the claim being framed as if the agreement dealt with the land only.

The defendants did not defend the action and the usual order nisi was made and eventually a final order was taken out by which the agreement was cancelled, the interest of the defendants in the land in question was foreclosed, all moneys paid under the agreement were forfeited and the defendants were ordered to deliver up possession of the premises. The defendants, pursuant to said order, gave up possession of the premises, but they refused on demand to give up possession of the chattels. The plaintiff brings this action for recovery of the chattels and the defendants inter alia raise the defence of "res judicata."

I assume for the purpose of the case that the agreement in question, having reference to both the land and the chattels, is an entire contract as contended for by counsel for the plaintiff and that, under the agreement the defendants could not be regarded as having the absolute title or ownership of the chattels unil the purchase price was paid.

There is nothing in the agreement to indicate how much of the $8,000 was for land or how much for chattels and any payment that was made, must be held to have been made on the purchase price of both the land and the chattels.

The defendants, under and by virtue of the agreement and the payments made on account thereof, secured an interest in the land and the chattels to the extent of the payments made and secured the right to absolute title of same upon payment of the balance of the purchase price. Counsel for the plaintiff contends that any right or interests which the defendants had in the chattels were lost when the agreement was cancelled. I cannot agree with that contention. The defendants secured an interest in the chattels under the agreement and by virtue of their payments, which the mere cancellation of the agreement could not destroy, and especially so in view of the fact that in the action in which the cancel-

lation order was obtained no mention or suggestion was made that the agreement had anything to do with these chattels.

If the plaintiff had wanted recovery of the chattels and cancellation of the defendants' interest in them, he should have asked for same in his original action and, had he asked for same, it is very probable the defendants would have had something to say. Not having asked for this relief in that action he cannot get it now. The matter is "res judicata."

In this connection I might quote from the Vice-Chancellor in the decision of Henderson v. Henderson, 3 Hare p. 114, where he says:—

"I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

See also Serrao v. Noel, 15 Q. B. D. 549.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed.

THE

Western Law Reporter

VOL. XXX. TORONTO, MAY 8, 1915. No. 19

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

LA PLANTE v. KINNON.

Contract—Entire—Wages—Farm Labourer.

A contract between a farmer and a farm labourer by which the latter agrees to work for the season at a certain sum per month to be paid at the expiration of the season is an entire contract and the labourer must complete the season before he is entitled to recover anything.

***Owen* v. *James*, 4 Terr. L. R. 174, followed.**

***Mousseau* v. *Tone*, 6 W. L. R. 117, distinguished.**

An appeal from the trial judgment in favour of defendant in an action brought by plaintiff, a farm labourer, for the recovery of wages.

The appeal was heard by NEWLANDS, BROWN and ELWOOD, JJ.

T. J. Blain, for plaintiff, appellant.

H. F. Thomson, for defendant, respondent.

The judgment of the court was delivered by

BROWN, J.:—The evidence given at the trial before the learned District Court Judge is conflicting as to the terms of the hiring. According to the plaintiff's version, he was hired at $35 per month until harvest, and during harvest was to get harvest wages. He worked until harvest, and then demanded harvest wages. The defendant refused to give any increase in wages, contending that the hiring was for the

season at $35 per month. The plaintiff thereupon left the defendant's employ, although notified by the defendant that if he did so he would not get anything. According to the defendant's version, the plaintiff was hired at $35 a month for the season, and with the exception of a little money for tobacco and other small necessaries, the wages were not to be paid until the end of the term when the plaintiff had threshed his grain. The learned trial judge dismissed the action, and must therefore have accepted the defendant's version of the contract. A contract such as the defendant has set up is an entire one, and the plaintiff is bound to complete the term before he becomes entitled to recover anything. The facts of this case are practically the same as those in the reported decision of ex-Chief Justice Wetmore, in Owen v. James, 4 Terr. L. R. p. 174. In that case the learned trial judge held that the plaintiff could not recover, and he there refers to the leading authorities on the question. In vol. 20 Hals. at p. 84, the law is laid down as follows:—

"160. When the contract is an entire contract, providing for payment on the completion of a definite period of service, or of a definite piece of work, it is a condition precedent to the recovery of any salary or wages in respect thereof that the service or duty shall be completely performed, unless the employer so alters the contract as to entitle the servant to regard it at an end, in which case the whole sum payable under the contract becomes due, or unless there is a custom that the servant is entitled to wages in proportion to the time actually served. But when the contract, though in respect of work terminating at a particular time, is to be construed as providing that remuneration shall accrue due and become vested at stated periods, such remuneration constitutes a debt recoverable at the end of each such period of service."

The case of Mousseau v. Tone, 6 W. L. R. 117, was relied on by the plaintiff. The terms of hiring in that case were clearly distinguishable. There the plaintiff hired for a term of 7 or 8 months at $25 per month, without any suggestion being made that payment would be withheld until the expiration of the term, and it was held that in such a case the wages became payable at the end of each month, and that the only remedy the employer would have would be by way of counterclaim for damages because of the servant's wrongful leaving. There is no evidence that would justify a finding that the plaintiff was a domestic servant, as contended for

by counsel, and I therefore do not consider it necessary to deal with the contention raised by him of special privilege in such cases.

The appeal should therefore, in my opinion, be dismissed with costs.

Appeal dismissed.

SASKATCHEWAN.

MARCH 20TH, 1915.

SUPREME COURT EN BANC.

IMPERIAL ELEVATOR & LUMBER CO. v. HILLMAN.

Pleading — Agency by Estoppel — Amendment at Close of Trial.

Where liability only arises by virtue of agency by estoppel, then agency by estoppel should be pleaded. However, if defendant's conduct and representations are such as to give plaintiff good reason for considering that there was actual agency, (although the facts do not support such a finding), the plaintiff should be allowed to amend his pleadings, at the close of the trial and plead agency by estoppel, where the facts will support such a finding.

Appeal from a judgment of Newlands, J.

The appeal was heard by HAULTAIN, C.J., LAMONT, BROWN, and ELWOOD, JJ.

J. F. Frame, K.C., for defendant, appellant.

J. A. Allan, K.C., for plaintiff, respondent.

BROWN, J.:—In the spring or early summer of 1913, one Chotem, being desirous of going into the hotel business, seems after some investigation to have decided that Limerick would be a suitable village in which to start up. There was already an hotel at Limerick called the Marshall House, and owned by one Marshall, of Moose Jaw. Chotem had in view the possible purchase of this hotel from Marshall, and he had also arranged for the purchase of certain vacant lots in Limerick from one Rothstein with the idea of building an hotel thereon in case he failed to deal with Marshall. As Chotem

and defendant were both Hebrews, they appear to have become well acquainted, Chotem frequently calling at defendant's place of business and discussing his plans with defendant. Defendant, being in the wholesale liquor business himself, evinced an interest in Chotem's venture. It would appear that Chotem feared either that he could not secure, or, having secured, could not hope to retain, a liquor license, on account of some marriage difficulty, and asked defendant to apply for the license in his (defendant's) name, stating by way of inducement that he, Chotem, would purchase his liquors from defendant. To this the defendant agreed. On July 21st, with the object of carrying this arrangement into effect, they went to a solicitor's office and had certain documents prepared, all of which were dated as of that date. One of these documents was an agreement of sale between Rothstein and Chotem for the purchase of the vacant lots in Limerick from Rothstein above referred to. This agreement was not executed until July 23rd, as referred to hereafter. In this agreement Chotem is described as of Limerick—indicating an intention on his part to the knowledge of defendant to thereafter live at Limerick. Another of the documents was a lease between Chotem and defendant of these lots, covering a term of three years, and calling for a rental of $50 per month. The third document was a petition in the usual form for a liquor license. This petition was executed by defendant, and in it defendant stated that he was applying for a license to sell liquors in the building occupied by him on the lots in question, the building to be known as "The Saskatchewan Hotel." He further stated that he was the true owner of the business for which the application was made, and that he was the lessee of the premises. In accordance with the requirements in such case, defendant made oath that the statements made in his petition were true. This petition was afterwards filed with the Liquor License Department, the same being received by that department on July 22nd. The petition came up for the consideration of the license commissioners in the usual manner at a subsequent date. On July 22nd, Chotem and defendant motored to Limerick. On their way they called at Moose Jaw in order to get Marshall, the owner of the Marshall Hotel, to go with them. Having secured Marshall, they reached Limerick on the morning of July 23rd. Defendant said that his sole object in going to Limerick on this occasion was to assist

Chotem in the purchase of the Marshall Hotel, to give him an idea of what it was worth, etc. Upon arrival an inspection was made of the Marshall Hotel, but defendant was of the opinion that the price asked for same was much too high, and so advised Chotem. Defendant stated that they then consulted with Mr. Giles, the manager of plaintiff company (which was the only lumber company doing business at Limerick at that time), and also with one Dickinson, a contractor there, and endeavoured to secure from these gentlemen an estimate of what the Marshall Hotel or one like it would cost. He stated that they were not prepared to give an estimate at that time, but promised to send same by mail to Regina. Defendant admitted that a few days after this the estimate reached him at Regina, and that he handed it over to Chotem, and said that so far as he was concerned he had nothing more to do with the matter. Defendant's evidence as to what took place at Limerick is in direct conflict with that of a number of witnesses, and some of them, apparently, very credible witnesses. The trial judge evidently wholly disbelieved the defendant's evidence in this respect. Chotem's version of the whole transaction is quite the contrary of defendant's; but it would appear that the trial judge, not having much faith in the testimony of either Chotem or defendant, gave defendant the benefit of the doubt where there was any conflict between them. We must therefore look to the evidence of other witnesses whom the trial judge evidently believed, to ascertain what took place at Limerick, and as these representations are very important to the case, I quote from the evidence as I find it in the appeal-book.

Examination of Thomas B. Giles:—

"Q. In any event Chotem introduced you to Hillman? A. To Mr. Hillman, yes, sir.

Q. When Chotem introduced you to Hillman what did he say? A. He said, 'This is the gentleman that is going to build a hotel here.'

Q. To whom did he refer then? A. He was introducing me to Mr. Hillman.

Q. When he said this was the gentleman who was going to build a hotel, who was he talking about, do you know? A. He was speaking of Mr. Hillman, giving me an introduction to Mr. Hillman.

Q. And he introduced Mr. Hillman as the gentleman who was going to build an hotel? A. Build a hotel, yes, sir.

Q. Did you know where that hotel was going to be built? A. Yes, on corner lots belonging to Rothsteins.

Q. How did you know that? A. Well, Mr. Rothstein was going to build there one time.

Q How did you know Mr. Hillman was going to build there? A. Mr. Rothstein came over, I think the day before, and told me he had a man from Regina who was going to build it.

Q. Hillman was introduced as the man who was going to build the hotel? A. Yes sir.

Q. After Chotem introduced Hillman, what did he do? A. The contractor was standing there, or came over about that time, and we went into Mr. Rothstein's store and drew a plan on a paper, just a rough sketch.

Q. What kind of an hotel did you . . . ? A. Mr. Hillman said he wanted to build a two-storey hotel if he could get enough rooms in to comply with the license law, and the contractor, he drew out the sketch on the paper, and they found they could not get enough rooms in a two-storey building.

Q. So what did they do then? A. Figured out a three-storey building.

Q. Who was doing all the figuring at that time? A. Mr. Hillman and Mr. Dickinson.

Q. What was Chotem doing? A. He was just standing around. He was not interested.

Q. How long did they figure there? A. Oh, for quite a few minutes there.

Q. And what conclusion did you ultimately arrive at? A. He wanted us to give him a figure on that. Said he could not stay in Limerick only a few hours. He wanted the contractor and myself to give him an estimate of what the cost of a building like that would be.

Q. Like what? A. The plan they had figured out, the rough sketch they had drawn out. And of course we told them we could not give an estimate on the building on that short notice.

Q. And what arrangement was made? A. The arrangement was made that we were to wire about the rough cost of the building, and construction.

Q. Wire whom? A. To Mr. Hillman.

Q. And did you do so? A. I didn't, but the contractor told me he did.

Q. Before Mr. Hillman left did he come to any arrangement with you as to future business at Limerick? A. In which way?

Q. Well, did you get any idea of how this work was going to be managed if you went on with the building? A. Mine was the only lumber yard in town at that time.

Q. Yes, but now, did you form any idea as to whether Mr. Hillman was going to come down and put up this building himself or get anybody else to do it for him? A. He told me that he could not be down there all the time, that Mr. Chotem would be there practically all the time.

Q. What was Mr. Chotem going to do? A. He was going to look after the building of the hotel.

Q. How did you know that? A. Just by what Mr. Hillman told me.

Q. Well, will you tell me what Mr. Hillman told you about this particular matter? A. He said, "I can't be down here all the time, but Mr. Chotem will be here practically all the time." That was, speaking about the building of the hotel."

John H. Dickinson:—

"Q. How did you become acquainted with Mr. Hillman? A. Chotem introduced me to Mr. Hillman.

Q. Where? A. On the street at Limerick.

Q. How did he introduce him? A. Well, he took me over to where Mr. Hillman was standing, and told Mr. Hillman I was a contractor at Limerick, and told me Mr. Hillman came here with the intention of building a hotel, and asked me to talk the matter over with him.

Q. What did Mr. Hillman say to that? A. Well, he verified the fact by stating so himself.

Q. What did he say? A. He said, 'I intend to build an hotel if I make the proper arrangements if it would not cost too much money.'

Q. Was there any site indicated for that purpose? A. Yes, sir.

Q. What was the site? A. The site was on the corner of the main street, I think, and Railway avenue. In fact it was right in front of where he was standing.

Q. Did you know then the site? A. Yes, he mentioned it.

Q. That is he mentioned he intended building an hotel on that site where you were standing? A. Yes.

Q. It was owned at that time by whom? A. Well, I don't know. I don't know who owned it at that time, but Rothstein was understood to have been the owner previously at any rate.

Q. That is the property on which you afterwards did erect a building? A. Yes.

Q. What did you do after he said he intended to put up an hotel there? What did he do about making proper arrangements? A. Well, after he told me what he wanted—he would like to build a two-storey hotel if he could get the rooms necessary under the License Act to make the hotel satisfactory for a license. We went to Mr. Rothstein's store, and we took some wrapping paper off the corner there and tried to make a rough sketch that would cover his ideas of a two-storey building, and found it would be impossible to get the number of rooms in that; and after talking awhile he said, well, he was in a hurry to get away to Regina again, and that perhaps we had better make an estimate on a three-storey building, leave two out of consideration altogether.

Q. Yes? A. We talked perhaps about half an hour about the hotel building altogether, and during his conversation there he told me it was altogether likely he would not be back again, at least not very often anyway, during the course of the construction of this building.

Q. Any arrangements made as to the superintendence of the building? A. Yes; Mr. Chotem was standing there and he turned around and pointed to Mr. Chotem and told him Mr. Chotem would be his agent at Limerick and he would transact all business for him, because he knew he would not have any time to spend up there, and that anything Mr. Chotem done would be done to his interest; he would be the inspector of the building, and come there and live there.

Q. He told you that before he left? A. Yes, sir.

Q. What arrangements did he have with you as to the estimate? A. He wanted me to wire him an estimate as soon as possible; in fact he wanted it that day; and it was impossible to figure up a building of that cost in the short time at our disposal. The trades are not all represented there, and I had to send outside to get an estimate, or roughly

guess them myself, and I didn't care to do that, so I arranged to wire him the estimate later on.

Q. Did you do so? A. I did.

Q. When? A. Well, I don't know the exact date, but it was within three or four days of that time, anyway."

After leaving Limerick, the auto party drove to Expanse and saw Rothstein, the owner of the lots above referred to, and it was on this occasion that the agreement for the sale of these lots was executed by Rothstein and Chotem. At that time, Rothstein says, the following conversation took place:—

"Q. What talk was there between you and Hillman before the agreement was signed? A. He said, 'You needn't be afraid we are not going to build a hotel. That is understood. I came in and I made arrangements with the lumberman and contractor to give me figure on it, and they gave a little sketch pencil drawing, that this is what we figure to build.'

Q. Hillman told you that? A. Yes.

Q. He told you they had made arrangements with the lumberman and contractor and this was what they were going to build? A. Yes.

Q. On your property? A. On my property.

Q. On the lots covered by the agreement? A. On those lots, yes."

This evidence is in corroboration of the evidence given by Giles and Dickinson above referred to. The defendant, in making these representations, evidently wished to leave the impression that he was the real owner of the intended business, so that there would be no difficulty in securing a license in his name, and Chotem was apparently only too willing to second the defendant's scheme in this respect. In a few days after the visit, Chotem went back to Limerick, and, presuming to act for the defendant, arranged with Dickinson to construct the hotel and ordered and secured building material from the plaintiffs. The plaintiffs furnished this material under the belief that the defendant was the person building the hotel, and that Chotem was his agent for the purpose of superintending the erection of same, and had authority to order from the plaintiffs any material necessary to that end. The trial judge has made a finding to the above effect, and there is ample evidence to support such finding. The plaintiffs continued to supply material under this belief until

August 31st, when the defendant sent a wire repudiating all liability in the matter. Certain telegrams, letters and documents had been sent to the defendant from time to time, some of which he received and some of which he denied ever receiving or knowing anything about. Those that he admitted receiving he stated he handed over to Chotem as being the only person who was interested. Certain telegrams were sent to the plaintiffs purporting to come from Hillman, and which apparently, at least to some extent, influenced the plaintiffs in supplying the material. These telegrams were sent by Chotem, who signed the defendant's name to them. Chotem says he had the defendant's authority to do so, but the defendant denies such authority, and states that he did not know anything about them. The defendant states that at no time up to August 30th, did he know that Chotem was using his name in the matter at all or that any material was being furnished on his (the defendant's credit). It is, however, very clear from the evidence that the defendant knew that Chotem was at Limerick erecting the hotel, and that the plaintiffs were furnishing material for the same. The learned trial judge, in his findings of fact, states as follows:—

"I would find as a fact that Hillman never intended to build an hotel at Limerick, nor did he intend to appoint this Chotem his agent, but I would find from the evidence that he acted in such a manner as to lead the plaintiffs to believe he did intend to build a hotel there and did intend to appoint Chotem his agent, and that on that they supplied the materials."

This finding is in effect—and I think the evidence more than justifies it—that although the defendant never had any intention of building an hotel or of appointing Chotem his agent for that purpose, yet he led the plaintiff to believe that he intended both. It should also be stated that both Giles and Dickinson went bondsmen for the defendant in connection with his liquor license application, the bond deed having been signed by them on July 23rd, during the defendant's visit to Limerick.

The result of the evidence, in the light of the findings of the learned trial judge, is briefly as follows:—

The defendant represents that he is the party applying for a license for an hotel to be built on these certain Rothstein lots in Limerick; he represents that he is the man who

is going to build the hotel for which he has so applied for a license; he represents that Chotem will be his agent at Limerick for the purpose of erecting same; he consults with the plaintiffs as to the material to be furnished for this hotel which he so contemplates building. When making these statements and representations he knows, according to his own evidence, that Chotem is going to build this hotel, because he states that he knew before leaving Regina that Chotem intended building on these lots if he (Chotem) failed to secure the Marshall Hotel. He knows that Chotem, within a few days after these representations are made, is proceeding with the erection of this very hotel which he said he was going to build, and for which Chotem was to be his agent. He knows that Chotem is getting material from the plaintiffs, with whom he consulted as to material. He, by virtue of his representations, put Chotem in a position where Chotem could presume to act for the defendant. He knows, or ought to know, that the plaintiffs are probably supplying the material on his credit and in the belief that the hotel is being erected for him. He takes no steps whatever until August 31st, to correct any impressions that he may have made.

The plaintiffs, under such circumstances, had a right to infer, as they did infer, that the hotel which was being constructed was the defendant's hotel, that Chotem was his agent, and had authority to secure the material from the plaintiffs for the purpose of its construction. Such inference is, in my opinion, the natural, reasonable, and only logical inference to be drawn. The fact that the plaintiffs on August 16th, took steps to get the defendant's signature to a written contract which was never signed does not, in my opinion, prejudice their position. On the contrary, it rather strengthens it, as it shews that they were taking reasonable precautions to protect themselves in the matter. No more, in my opinion, is their position prejudiced because they relied on the forged telegram of August 19th as being genuine. That telegram was only one, though an important factor, in the whole transaction. The real grievance lies in the fact, as found by the trial judge, that the defendant's actions were such all through as to lead the plaintiffs to believe that he was the party doing the business.

The agency which the trial judge finds is apparently agency by estoppel. In this connection Bowen, L.J., in Low v. Bouverie, [1891] 3 Ch. D. p. 106, says:—

"Now, an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed." See also 13 Hals. p. 379.

It is not necessary that the representation should be false to the knowledge of the party making it, provided that the person who makes it so conducts himself that a reasonable man would take the representation to be true and believe that it was made that he should act upon it in the manner in which it was acted upon. Freeman v. Cooke (1848), 2 Ex. 654; McKenzie v. British Linen Co. (1881), 6 A. C. 89; 13 Hals. p. 382.

In Pole v. Leask, 33 L. J. Ch. Lord Cranworth, at p. 161, says:—

"No one can become the agent of another person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case it is only by the will of the employer that an agency can be created.

"This proposition, however, is not at variance with the doctrine that where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed."

The pleadings in this case allege agency on the part of Chotem, but do not allege agency by estoppel. Counsel at the close of the trial asked to have the pleadings amended in this respect. The trial judge did not apparently deal with the matter, and, I infer, did not consider such amendment necessary. If the defendant's liability arises out of the fact that Chotem was his agent by estoppel—and I am of opinion that such is the case—then agency by estoppel should be pleaded. Mackenzie v. Gray & Sons, 28 W. L. R. p. 322;

Hayes v. Wilson, 29 W. L. R. p. 381. At the argument before us, counsel for the plaintiffs renewed the application to amend. I am of opinion that such amendment should be allowed.

In Boyle v. Grassick, 2 W. L. R. at p. 286, Wetmore, J., in giving the judgment of the full court of the North-West Territories, says:—

"There is no doubt that this court has, by virtue of Rule 507 of the Judicature Ordinance, power to make the amendment asked for, and by virtue of Rule 178 it ought to do so if it is necessary for the purpose of determining the real questions in controversy between the parties. Now, the real question in controversy between the parties here is, as I have stated, whether or not the plaintiffs are entitled to recover compensation for their services in connection with obtaining a purchaser for these lots. In my opinion, therefore, the amendment ought to be allowed, because it is questionable whether the plaintiffs were entitled to recover under the statement of claim as originally framed. In fact it is conceded that they were not entitled to recover under it, and that if entitled to recover at all it must be upon an alternative paragraph as set forth in the amendment."

In the case at bar the main question was that of agency on the part of Chotem, and the defendant's conduct and representations were gone into at great length by both sides in endeavouring to solve that question. The trial judge has found that the defendant's conduct and representations did not constitute agency in fact, but that they did constitute agency by way of estoppel. I do not think it can be said that the plaintiffs' counsel were at fault under the circumstances of this case in pleading as they did. There were good reasons for considering that there was a case of actual agency. I am unable to see in what way any injustice will be done the defendant by allowing the amendment, and, as great injustice would be done the plaintiffs by not allowing it, I am of opinion that the amendment should be made as asked for.

The appeal, therefore, should in my opinion be dismissed with costs.

ELWOOD, J. (dissenting):—The learned trial judge found that Chotem was not the plaintiff's agent, and in my opinion there was ample evidence to support this finding. In many

respects there was a direct conflict between the testimony given by Chotem and the defendant; the question as to which party was to be believed was one for the trial judge; he evidently believed the defendant instead of Chotem; and, in fact, in order to come to a conclusion that Chotem was not the defendant's agent he must have believed the defendant. That being so, we should not disturb the finding of the trial judge.

The trial judge, however, gave judgment for the plaintiff on his findings, and the findings upon which he gave this judgment are as follows: "I would find as a fact that Hillman did not intend to build an hotel there, and that he, as an actual fact had not appointed Chotem his agent, but that he acted in such a way as to lead the plaintiffs to believe he did intend to build an hotel there and that Chotem would be his agent."

I assume that the learned trial judge held from the facts before him that Chotem was created his agent by estoppel. Estoppel was not pleaded, but counsel for the respondent has asked leave to plead estoppel. Estoppel is a plea which must be pleaded with the greatest particularity, and in my opinion should be pleaded before judgment, so that the Court of Appeal may have the benefit of the findings of fact by the trial judge under that plea. This will be apparent from my subsequent remarks. However, assuming that the amendment should be allowed, what were the facts found by the trial judge to cause an estoppel? The above finding, taken by itself, cannot in my opinion create an estoppel. The finding is merely as to a statement of intention. In order to create an estoppel there must be a representation of an existing fact, and not promises de futuro. Halsbury, vol. 13, pp. 377, 379; Cyc. vol. 16, p. 752; Whitechurch, Ltd. v. Cavanagh, 71 L. J. K. B. 406; Citizens' Bank v. Bank of New Orleans, 43 L. J. Ch. 273; Hatfield v. C. P. R., 17 W. L. R. 554. Then what evidence was there that could create an estoppel? Evidence was given as to a conversation which took place between the defendant, Chotem, one Giles, the agent of the plaintiff, a builder named Dickinson, and some others. Dickinson was a witness called on behalf of the plaintiffs, and, he says this:—

"Well, he (Chotem) took me over to where Mr. Hillman was standing, and told Mr. Hillman I was a contractor at

Limerick, and told me Mr. Hillman came here with the intention of building an hotel, and asked me to talk the matter over with him.

Q. What did Mr. Hillman say to that? A. Well, he verified the fact by stating so himself.

Q. What did he say? A. He said, 'I intend to build an hotel if I make the proper arrangements, if it would not cost too much money.'"

Giles was present when this conversation took place. After this conversation, these various parties went over to Rothstein's store, and a rough sketch of the proposed hotel was made, and the defendant stated that he was in a hurry to get away and perhaps there had better be an estimate. There was considerable conversation, and, according to Dickinson, during that conversation he says that Chotem was standing there and "he (I assume the defendant) turned around and pointed to Mr. Chotem and told him Mr. Chotem would be his agent at Limerick, and he would transact all his business for him, because he knew he would not have any time to spend up there, and that anything Mr. Chotem done would be done to his interest; he would be the inspector of the building, and come there and live there."

It will be observed that all that conversation took place with regard to an hotel which the defendant said might or might not be built by him, because, as I said above, Dickinson said that the defendant stated that he intended to build an hotel if he made the proper arrangements and it would not cost too much. At that time there was no estimate as to the cost. About that time Chotem had leased certain property in Limerick to the defendant, and in the application for license defendant stated that he was the lessee of the premises. From the evidence, this application must have been seen by Giles. The arrangement between Chotem and the defendant, according to the defendant's evidence, was that the application for the license was to be made in the defendant's name because it was thought that the defendant would be more likely to get a license than Chotem, but that in reality the business was to be run by Chotem for himself. The only benefit that the defendant would derive would be the money he would make in selling liquors to Chotem, the defendant being a wholesale liquor merchant. Dickinson subsequently sent an estimate of the cost of the building to

the defendant which the defendant handed to Chotem. Chotem proceeded to enter into a contract with Dickinson for the erection of the building. So far as the conversations with Hillman above referred to are concerned, in my opinion, in order to render the defendant responsible for the actions of Chotem, it would be necessary at least to shew that the defendant did commence the erection of the hotel or did enter into a contract with some person for the erection of an hotel, because at the most those conversations simply go this far, that if he did erect an hotel Chotem would be his agent. A number of telegrams were put in evidence, some to the defendant and some purporting to be from the defendant. A number of those received by the defendant were handed over by him to Chotem, because he said that he understood from Chotem that he (Chotem) was erecting the hotel himself, and that as Chotem was away a good deal from Regina he had instructed the telegrams to be sent to the defendant, and when these telegrams came the defendant handed them over to Chotem without any instructions as to reply. There was nothing in the telegrams to lead the defendant to believe that he was being held responsible for the hotel, and they were quite consistent with the statement of the defendant that the telegrams were simply being sent to the defendant for the purpose of being communicated to Chotem. There was a number of replies sent in the defendant's name, but they were clearly, without his authority, and the defendant cannot be held responsible for them; and the learned trial judge must have believed that they were sent without the defendant's authority, otherwise he, I am of the opiniion, must have found there was an actual agency. The transaction with regard to the $500 is explained by the defendant, and according to this explanation, it does not seem an unreasonable one. The $500 was not paid to the plaintiffs, but to Dickinson, and Giles is very indefinite as to when he learned about this $500 payment. Subsequently Giles handed to Chotem a contract and asked Chotem to have the defendant sign it. Chotem says he handed this to the defendant, and the defendant kept it a long time and finally returned it. On the other hand the defendant says it was never handed to him, that Chotem shewed him the paper without his reading it, and told him it was a guarantee of an account and said he would like him to guarantee the account; the defendant refused to do so, and never saw the contract again. The learned

trial judge makes no finding on these facts, but as he has apparently found in favour of the defendant where there is a conflict of testimony between the defendant and Chotem, I would be prepared to accept the defendant's statement of what took place rather than the statement of Chotem. There was another contract forwarded by one Wilson. This was received by the defendant on the day that he received the following telegram from the plaintiffs:—

"Third storey now on hotel if you don't want me to hold up the work you must keep your part of the agreement."

As the result of this telegram, and of the receipt of this contract from Wilson, the defendant says that for the first time he realized that Chotem was apparently purporting to act as his agent, and he immediately wired to all parties repudiating anything that Chotem had done. Even if the defendant did receive the copy of the contract which Chotem says he handed to the defendant, I am of the opinion that there can be no estoppel so as to create an agency by retaining that contract. The contract was not signed by the defendant, and it was sent to the defendant for the purpose of being signed by him. If it had purported to have been signed by the defendant, then, I think, he would have been clearly liable for any goods which were advanced by the plaintiffs after the contract had come into his hands, on the ground of what is termed in Ewart on Estoppel, p. 18, as "assisted misrepresentation." But a perusal of the cases of assisted misrepresentation, I think, must convince one that the obtaining of this document under the circumstances of this case could not possibly be any misrepresentation. At any rate, the plaintiffs apparently relied, not upon the retention by the defendant of this document, but on a telegram which Chotem sent to them, signed with the defendant's name. Chotem says that he had the defendant's authority to sign this. The defendant says he had not; and there, again, we have no direct finding of the trial judge as to which of the parties he believes, except that I think we can infer that he must have believed the defendant rather than Chotem, because otherwise I think he would have found that there was an actual agency. I, at any rate, in view of the general findings of the trial judge, would accept the evidence of the defendant rather than the evidence of Chotem. In Whitechurch v. Cavanagh (ante), at p. 414, it is stated that "to

create an estoppel, the evidence must be clear and unambiguous;" and it seems to me that it cannot be said that the acts or the words of the defendant do clearly and unambiguously shew a holding-out by the defendant that Chotem was in any way his agent, or that the defendant had in fact commenced or concluded to commence the building of an hotel.

In my opinion, therefore, the appeal should be allowed and judgment entered for the defendant dismissing the plaintiff's action, the defendant to have his costs of action and of this appeal.

Appeal dismissed; ELWOOD, J., *dissenting.*

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